(26,434)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 967.

J. H. BRANSON, SHERIFF AND COLLECTOR OF CRAWFORD COUNTY, AND J. J. CRAVENS, W. B. SMITH, AND R. F. HAMER, COMMISSIONERS OF ROAD IMPROVEMENT, DISTRICT No. 2, CRAWFORD COUNTY, ARKANSAS, APPELLANTS,

vs.

B. F. BUSH, RECEIVER OF THE PROPERTY OF ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 7, 1918.

1 (Citation and waiver of service.)

United States of America, To J. H. Branson, Sheriff and Collector of Crawford County, and J. J. Cravens, W. B. Smith and R. F. Hamer, Commissioners of Road Improvement District No. 2, Crawford County, Arkansas—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Western District of Arkansas, wherein B. F. Bush, Receiver of the property of St. Louis, Iron Mountain & Southern Railway Company is appellant and you are appellees, to show cause, if any there be, why the judgment rendered against the said appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Frank A. Youmans, Judge of the District Court of the United States for the Western District of Arkansas, this 17th day of March, in the year of our Lord one thusand nine hundred and Seventeen.

FRANK A. YOUMANS,
Judge United States District Court
for the Western District of Arkansas.

We hereby acknowledge receipt of copy of the within Citation and waive service thereof this 19th day of March, 1917.

C. A. STARBIRD,
G. B. ROSE,
Attorneys for Appellees.

Endorsed: Filed in the District Court on March 26, 1917.

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2 Petition for enlargement of time to file transcript.

(Filed in U. S. District Court May 12, 1917.)

B. F. Bush, Receiver of the St. Louis, Iron Mountain & Southern Railway Company, Plaintiff,

vs.

J. H. Branson, Sheriff and Collector, et al, Defendants.

Comes B. F. Bush, Receiver, petitioner herein, and respectfully represents and shows to the court as follows:

That the citation herein was issued on the ... day of March, 1917; that in the preparation of the record it became, and was necessary to prepare bill of exceptions; that the attorneys for petitioner promptly had evidence introduced at the hearing in this cause transcribed, and prepared the bill of exceptions, which was submitted to opposing counsel; that Mr. George B. Rose, one of the attorneys for defendants, was absent from the State of Arkansas at the time said bill of exceptions was transmitted to him, and remained away from the State until the ... day of April, 1917;

That this petitioner is informed by the clerk of this court that there is not sufficient time in which to prepare the record and to lodge the same in the clerk's office of the Circuit Court of Appeals within the time allowed for the return of the citation issued herein.

Wherefore petitioner prays an order of this court ex-
3 tending the time until June the 1st, 1917.

Respectfully submitted,

THOS. B. PRYOR,
Atty. for Plff.

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4 Order enlarging time to file transcript.

(Filed in U. S. District Court May 12, 1917.)

On this day comes on to be heard the petition of plaintiff, asking an extension of time in which the return on citation issued herein is to be made, and in which to file transcript of record in the office of the clerk of the Circuit Court of Appeals. For good cause shown, it is ordered that the return day of the citation issued herein, and the time in which to lodge the record in said court, be, and the same is hereby extended until June the 1st, 1917.

FRANK A. YOUMANS, Judge.

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5 District Court of the United States, Western District of Arkansas, Fort Smith Division.

Record of proceedings in the District Court of the United States for the Western District of Arkansas in the above entitled cause, which was begun in said court March 17, 1916, and proceeded to final decree therein March 17, 1917.

During the progress of said cause pleadings were filed and proceedings had as hereinafter set out, viz:

(On March 17, 1916, complaint in equity was filed, said complaint being omitted from this transcript in accordance with precipe filed May 21, 1917.)

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6 Order Granting Temporary Injunction.

(Entered in U. S. District Court March 24, 1916.)

Benjamin F. Bush, as Receiver for St. Louis, Iron Mountain & Southern Railway Company, Complainant,

No. 259 vs. Equity.

J. H. Branson, Tax Collector, Crawford County, Arkansas, and J. J. Cravens, W. B. Smith and R. F. Hamer, Commissioners of Crawford County Road Improvement District No. 2, Defendants.

On this day comes on to be heard the petition of the complainant filed herein, and it appearing to the court that the complainant upon the facts set out in the petition is entitled to the relief prayed for, it is therefore ordered and adjudged that a temporary injunction be granted herein, enjoining J. H. Branson, as Tax Collector, from collecting or attempting to collect any of the taxes certified by the Secretary of the Board of Commissioners of Crawford County Road Improvement District No. Two, on account of said Road Improvement District, and that the Board of Commissioners, and each of them, be and they are hereby enjoined and restrained from adding any penalty to the amount of the tax assessed against the property of the St. Louis, Iron Mountain & Southern Railway Company, and that all said defendants be enjoined and restrained from preceeding to enforce the collection of said taxes until further order of this court, upon the complainant filing with the clerk an approved bond in the sum of $1000.00, conditioned as required by law with sufficient sureties.

Witness my hand this 24th day of March, 1916.

FRANK A. YOUMANS,
Judge.

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7 Injunction Bond.

(Filed in U. S. District Court March 24, 1916.)

Whereas, the said B. F. Bush, as Receiver of the St. Louis, Iron Mountain & Southern Railway Company, has obtained an order of injunction against the defendants in the above action, pending in said above entitled court, upon condition that the complainant be required to execute bond in the sum of One Thousand ($1000.00) Dollars;

Now, therefore, we, B. F. Bush, as Receiver, as principal, and I. H. Nakdiman, as surety, hereby undertake in the sum of One Thousand ($1000.00) Dollars that the complainant shall pay to the said defendants any damages that they may sustain by reason of the issuing of said injunction, if it should be finally decided that the said injunction should not have been granted.

Witness our hands this 18th day of March, 1916.

B. F. BUSH,
as Receiver,
By Thomas B. Pryor
His Attorney.

I. H. NAKDIMEN

Approved March 24, 1916.
Frank A. Youmans,
Judge.

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8 (On March 31, 1916, Amended Bill in Equity was filed, which is omitted from this transcript in accordance with precipe filed May 21, 1917.)

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9 Second Amended Bill in Equity.

(Filed in U. S. District Court January 10, 1917.)

Benjamin F. Bush, as receiver for the St. Louis, Iron Mountain & Southern Railway Company, Plaintiff,
vs.
J. H. Branson, Sheriff and Ex-officio Tax Collector of Crawford County, Arkansas, and J. J. Cravens, W. B. Smith and R. F. Hamer, Commissioners of Crawford County Road Improvement District Number 2, and Crawford County Road Improvement District Number 2, Defendants.

Comes now Benjamin F. Bush, as receiver for the St. Louis, Iron Mountain & Southern Railway Company, and

for complaint and cause of relief herein against the defendants, alleges:

1st. That the St. Louis, Iron Mountain & Southern Railway Company was incorporated under the Acts of Arkansas of 1868, and under the laws of Missouri, and under the Constitution of the State of Arkansas, of 1868, in June, 1874, by a consolidation of the Cairo & Fulton Railway Company with the St. Louis, Iron Mountain Railway Company, and became a corporation under the laws of Missouri and Arkansas, and that by reason thereof, its charter became a contract with the State under said Constitution of the State of Arkansas of 1868, and the Constitution of the State of Arkansas of 1874, became and are a part of the Charter of the said St. Louis, Iron Mountain & Southern Railway Company; that said Railway Company owns, and was prior to August 19th, 1915, engaged in operating a line of railroad extending into and through the States of Arkansas, Missouri and Louisiana and other states, and was engaged in interstate commerce; that said line of railroad in the State of Arkansas extends through many of the counties in said State, including the County of Crawford, in the Fort Smith Division of the Western District, of the United States District Court.

2nd. That the plaintiff, Benjamin F. Bush, was on the 19th day of August, 1915, duly and regularly appointed receiver for the said St. Louis, Iron Mountain & Southern Railway Company, in the District Court of the United States within and for the Eastern District of Missouri, Eastern Division, and that ancillary proceedings in connection with said receivership was duly and regularly filed in the United States District Court for the Western District of Arkansas, at Fort Smith, Arkansas, on August 23rd, 1915.

3rd. That the order appointing the said plaintiff, receiver for the St. Louis, Iron Mountain & Southern Railway Company, in paragraph 1 thereof, among other things, provides:

"That Benjamin B. Bush, of St. Louis, in the State of Missouri, be, and hereby is appointed receiver of all and singular the railroads, lands, assets, rights, liens, claims, interests, franchises and property, real, personal and mixed of whatsoever kind and description, and wheresoever situated of the defendant, St. Louis, Iron Mountain & Southern Railway Company etc."

and in paragraph 2 of said order, it in part provides:

"That said receiver be and hereby is authorized and directed immediately to take possession of all and singular said railroads, rolling stock, franchises, rights of property and premises above described and referred to, [wherever] situated or found, whether in this State, this Judicial Circuit or elsewhere, and to run, manage, maintain and operate said railroads and property, including such railroads and property as the defendant Railway Company holds, controls or operates under lease, stock ownership, or otherwise."

And that said order in paragraph 3 thereof, in part provides:

"That said receiver be, and hereby is authorized and empowered to institute and prosecute within this State, or elsewhere, and in his own name as receiver, or in the name of the defendant, Railway Company, as he may be advised by counsel, all such suits as in his judgment may be necessary for the recovery, or proper protection of said property, or any part thereof."

11 4th. That the said Banjamin F. Bush, on the said 19th day of August, 1915, did qualify as such receiver, and thereupon took charge of all of the property of the St. Louis, Iron Mountain & Southern Railway Company, as provided by said order of court, and is now, and has been from and after the date of his appointment and qualification, operating said property in both intrastate and interstate commerce, and otherwise managing and operating the same as such receiver, and that as such receiver, and by reason of the authority conferred upon him by the court making his appointment, he has succeeded to all of the rights and franchises, and choses in action of every kind and description of the St. Louis, Iron Mountain & Southern Railway Company, and particularly to any and all rights existing by virtue of the Charter and contract entered into and existing between the said Railway Company and the State of Arkansas at the time of its organization.

5th. That the plaintiff is a resident and citizen of the City of Saint Louis, in the State of Missouri, and that the defendants, J. H. Branson, Sheriff and Ex-officio Tax Collector of Crawford County, Arkansas, and J. J. Cravens, W. B. Smith and R. F. Hamer, Commissioners of Crawford County Road Improvement District Number 2, and the Crawford County Road Improvement District Number 2, are residents of the County of Crawford, Western District, in the State of Arkansas, and that the Crawford County Road Improvement District Number 2 purports to be a corporation, formed, organized and existing by a purported act of the 1911 session of the Arkansas Legislature, with its location or situs near Alma, in the County of Crawford, Western District of the State of Arkansas.

6th. That in April, 1911, the General Assembly of the State of Arkansas passed purported Act Number 228, the same being "An Act to create Crawford County Road Improvement District Number 2", the portions of said Act which are pertinent to the issues herein, are Sections 1, 2, 3, 5, 6 and a part of 11, and are as follows:

"Section 1. The lands hereinafter described are hereby made an improvement district for the purpose of building a highway in Crawford County, Arkansas. J. J. Cravens, L. W. Black and J. D. Byers are hereby named the commissioners for said district, to hold office for the term of six years, and until their successors are appointed and qualify in the manner hereinafter provided. They and their successors are hereby declared to be a body corporate under the style of "Crawford County Road Improvement District Number Two," with power to sue and be sued, to have a corporate seal, and to do all things necessary to carry out the purposes of this Act. Upon the expiration [on] their terms, the County Judge of Crawford County shall appoint three commissioners to succeed them, one of whom shall hold office for two years, one for four years, and one for six years, and thereafter the commissioners of said district shall be maintained in perpetual succession as a board of improvement for the preservation and maintenance of the highway herein contemplated. Vacancies on the board shall be filled by the county court.

Section 2. Said district is hereby organized for the purpose of improving the road in Crawford County, beginning near the southwest corner of the north-west quarter of the north-west quarter of section 8, township 9 north, range 30 west, in the town of Alma; thence in a southerly direction through the west half of sections 8, 17 and 20, in township 9 north, range 30 west, and the north-west quarter of section 29, in township 8 north, range 30 west; said road being the road heretofore laid out and opened up by the county court of Crawford County. The improvements to be made by said district are to be made on the road as now laid out by the county court of Crawford County, or substantially on this line and changes in the line of said road to be approved by the county court of Crawford County.

Said highway is to be constructed of macadam, or of such other material as the commissioners may deem best, and they are authorized to build such bridges and culverts as they may find desirable. Any bridges built shall be built as approved by the said county court. In building said highway the commissioners may proceed by letting the work as a whole, or in sections, or they may build the same, or any part thereof, with

day labor and the use of such county and State convicts as may be conceded to them by the State or Crawford County. In case bids are advertised for the commissioners shall have the right to accept or reject any bid.

Section 3. The territory embraced within the said district shall be the corporate limits of the incorporated town of Alma, and sections 4, 5, 6, 7, 8, 9, 16, 17, 18, 19, 20 and 21, in township 9 north, range 30 west in Crawford County; and all railroad rights-of-way situated in any of the lands in the said district.

Section 5. It is ascertained and hereby declared that all real property within said district including railroads and tramroads, will be benefited by the building of the said highway more than the cost thereof as appropriated in the county assessment of each piece of property within the district, for this and the succeeding years, and the cost thereof is made a charge upon such real property superior to all other mortgages and liens except the liens for the ordinary taxes, and for improvement districts heretofore organized; and the said commissioners are authorized and directed each year to levy upon said land an amount sufficient to pay the necessary expenses of the district for that year, and all interest and principal of bonds maturing, and all installments of the sinking fund, if any such there be, which assessment is to be collected from the owners of real property, railroads and tramroads in the manner hereinafter provided, and in proportion to their respective assessments as shown by the then last county assessment.

Section 6. The secretary of the board shall each year, on or before the first day of January, make out and deliver to the Collector of Crawford County a book showing all lands, railroads, and tramroads within the district, in parcels, as the same appear upon the county assessment books of Crawford County, the name of the owner there appearing, and the amount of taxes to be collected for Crawford County Road Improvement District No. Two, as levied by the commissioners of said district, and it is made the duty of the collector of said county to collect said taxes, along with other taxes, and for his services the collector shall have and receive the same commission that he is allowed for collecting the taxes of the County and State. Said taxes, when collected, shall be paid over to the treasurer of the district at the same time that he pays over the county funds. If the collector shall fail to collect taxes hereby provided for, along with other taxes, he shall be subject to a penalty of one hundred ($100) dollars for each instance in which he shall col-

lect from an individual the other taxes and omit the road tax provided for herein, unless said road tax has been enjoined by a court of competent jurisdiction, the said penalty to be recovered in a suit by the commissioners to the use of the district.

Section 11. All taxes levied under the terms of this Act shall be payable between the first Monday in January, and the 10th day of April, of each year, and if any taxes levied in pursuance of this Act are not paid at maturity, the collector shall not embrace such taxes in the taxes for which he shall sell the lands, but he shall report such delinquencies to the board of commissioners of said district, who shall add to the amount of the tax a penalty of twenty-five per cent; and said board of commissioners shall enforce the collection by chancery proceedings in the Crawford County Court having chancery jurisdiction; and said court shall give judgment against said lands, railroads, tramroads for the
14 amount of such taxes, and said penalty of twenty-five per cent, and interest on same, from the end of said sixty day allowed for the collection thereof, at the rate of six per cent per annum, and all costs of the proceedings, etc."

7th. That the said L. W. Black and J. D. Byers, named in Section 1 of Act 228, as two of the commissioners of said road district, resigned from said commission, and that thereafter the said defendants, W. B. Smith and R. F. Hamer were duly appointed as members of said commission by the County Judge of Crawford County, Arkansas, as their successors, and subsequent to their said appointment, were duly qualified and entered upon the duties imposed upon said commissioners by said Act.

8th. That the St. Louis, Iron Mountain & Southern Railway Company has property located within said district as follows:

Town of Alma: 1.5 miles main line track, and 1.19 miles of side track, and outside of the town of Alma, and within the boundaries of said district 2.1 miles of main line track,

and that in pursuance of Section 6 of said Act, the Secretary of the Board of Commisisoners for said Road Improvement District made out and delivered to the said defendant, J. H. Bransom, Sheriff and Ex-officio Collector of Crawford County, Arkansas, a book, in which the following purported assessment of benefits against the property of the St. Louis, Iron Mountain & Southern Railway Company, were made, to-wit:

In the Town of Alma.

Main track,	1.05 miles,	$26,250.00	$183.75
Side track	1.19 miles	3,570.00	24.99
Rolling Stock		2,100.00	14.70
Buildings,		970.00	6.79
Value of material etc.		70.00	.49
Total,		$32,960.00	$230.72

Out Side of the Town of Alma.

Main track,	2.1 miles	$52,500.00	$367.50
Side track	nothing		
Rolling stock		4,200.00	29.40
Total,		$56,700.00	$396.90

and that under said purported assessment, and under the provisions of the Act of the Legislature in organizing said district, the aggregate amount of taxes which will be collected from year to year for a period of twenty years will exceed the sum of $12,000.00, and the amount as certified by the Secretary of the Board of Commissioners to the Sheriff and collector for the present year, amounts to the sum of $627.62.

9th. That under the provisions of Section 6 of said Act, if the collector shall fail to collect the taxes as provided by said Act, along with and at the time he collects other taxes he shall be subject to a penalty of $100.00 for each case or instance in which he fails to do so, unless the collection of the road tax has been enjoined by a court of competent jurisdiction at the time the law makes it his duty to collect the other taxes, and that unless defendants are enjoined, the collector will refuse to receive the state, county or other taxes due upon the property of the St. Luois, Iron Mountain & Southern Railway Company, and the same will be returned delinquent by said collector, and thereupon great penalties will be assessed against the property of said Railway Company in addition to its regular taxes, as provided by Section 7084 of Kirby's Digest of the Statutes of Arkansas, which in part reads:

"It shall be the duty of the clerk of the County Court to add a penalty of twenty-five per centum upon all taxes so returned delinquent, which penalty shall be collected in the manner provided for the collection of delinquent taxes."

10th. And that in addition thereto, if the collection of said taxes are not enjoined by this court, that under the provisions of Section 11 of said Act, that the said defendants

who constitute the board of commissioners of said district, will assess a penalty of twenty-five per cent on the amount of said road improvement tax.

11th. That the assessment of the property of this
16 plaintiff as certified to the tax collector includes the following items of rolling stock, viz.:

In The Town Of Alma.

Rolling stock, ...$2100.00

Out Side Of The Town Of Alma.

Rolling stock, ...$4200.00

and in addition thereto, there is charged in the town of Alma, the value of materials etc., $70.00; that the amount of taxes charged against said items of rolling stock and materials for this year, aggregate $44.59; that said items are in violation of Section 11, Article 17 of the Constitution of the State of Arkansas, which provides:

"The rolling stock and all other movable property belonging to any railroad company or corporation in this State shall be considered personal property."

And is also in violation, and contrary to the provisions of Section 5 of the Act of the Legislature creating said road district, and especially that part thereof, which provides:

"And the said commissioners are authorized and directed, each year to levy upon said land an amount sufficient to pay the necessary expenses of the district for that year etc."

Said assessment of rolling stock is also in violation of that portion of Section 1 of Article 14, or the Fourteenth Amendment to the Constitution of the United States, which provides:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the law."

in that the said personal property of the St. Louis, Iron Mountain & Southern Railway Company is assessed and treated as a part of the assets of the said road district, whereas the personal property of no other individual or corporation
17 embraced in said road district are so assessed.

12th. That the assessment upon which the benefits against this plaintiff is charged for the construction of said road, both as to roadbed, right of way, trackage, buildings etc.,

as well as to the rolling stock, is illegal, inequitable, unjust and unfair, and in violation of Section 5 of Article 16 of the Constitution of Arkansas, which in part reads:

"All property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the state. No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value."

And also Section 6906 of Kirby's Digest of the Statutes of Arkansas, which in part, reads:

"Each person required to list property shall make out and deliver to the Assessor a statement, verified by his oath or affirmation, * * * * * (said oath in part, providing) "that I have estimated and put down the value of such property, not at what it might sell for at forced sale, but at what would be its fair market value, so help me God."

And also in violation of Section 1 of Article 14 of the Constitution of the United States heretofore referred to, for the reason that the property of this plaintiff is listed at its fair [cask] market value, whereas, all other property included within said road district, and subject to assessment for the construction and maintenance thereof, is listed or assessed at fifty per cent and less than fifty per cent of its fair [cask] market value.

13th. That said assessment against the property of this plaintiff for the construction and maintenance of said road is unjust, inequitable and void, for the reason that it was not assessed and returned in compliance with Section 5 of the Act creating said road improvement district, and providing for the maintenance of said road, and especially that portion
18 of same, which reads:

"It is ascertained and hereby declared that all real property within said District, including railroads and tramroads, will be benefited by the building of the said highway more than the cost thereof as appropriated in the county assessment of each piece of property within the district etc. * * * * * * * * which assessment is to be collected from the owners of real property, railroads, and tramroads in the manner hereinafter provided, and in proportion to their respective assessments as shown by the then last county assessment."

but that said assessment was based upon, and made in accordance with an Act of the General Assembly of the State of Arkansas, which was approved April 28, 1911, and entitled "An

Act to provide the manner of assessing for taxation the property of Railroads, Express, Sleeping Car, Telegraph, Telephone and Pipe Line Companies," which was approved May 4th, 1911, the portion of said Act which is pertinent being Section 2, 5, 13 and 14, and are as follows:

"Section 2. The franchise (other than the right to be a corporation) of all railroads, express, telegraph and telephone companies, are declared to be property for the purpose of taxation and the value of such franchises shall be considered by the assessing officers when assessing the property of such corporations. If valuing for assessment purposes the property of such corporations the Arkansas Tax Commission shall determine the total value of the entire property of the corporation, tangible and intangible.

Section 5. The information provided for in Section 4 of this Act shall be made upon such forms as may be prescribed by the Arkansas Tax Commission. The statements contained in such certificates shall be sworn to by the general officer of the corporation, whose service therein makes it his duty to be personally informed with respect to the matters to be included in such certificate. False swearing in making any of the statements required to be set forth in said certificate is hereby declared to be perjury and shall be punished as such. If the commission shall have reason to believe that any statement contained in such certificate filed with it is false in any material matter it is hereby made its duty to procure other information about the matters to be contained in such certificate. The commission shall have power, and it is hereby made its duty to resort to other sources of information in the event any such corporation shall fail or neglect or refuse to file the certificate aforesaid.

Section 13. The commission shall determine in the case of each railroad it assesses the value per mile of
19 the main track, the value per mile of the side track, turn-outs, the value of each building and the value of the average stock of materials, including machinery and repair stores, timber, ties and rails carried the next year next preceding the year the assessment is made and the value per mile of the rolling stock owned by the road at assessing time. For the purpose of finding the value of the rolling stock of railroads of this State the Commission shall take the total value as stated in the schedule of the rolling stock of each of the respective railroads of this State filed and prepared in accordance with the requirements of this Act, and divide the same by the number of miles in the entire length of such railroad and the result shall be the value per mile of the rolling stock

of such railroad for purposes of taxation, and the value per mile of such rolling stock so ascertained shall be multiplied by the number of miles thereof lying and being in any county, and the product thereof is the sum to be taxed in such county.

Section 14. The buildings and side tracks of railroads shall be assessed as real estate, and each building or side track shall be assessed in the incorporated town or district where located. Main track shall also be assessed as real estate, and it shall be apportioned for assessment and taxation between the several towns and school districts through which the railroad run according to the actual mileage in each town and district. Rolling stock shall be assessed as personal property, and it shall likewise be apportioned between the several towns and districts through which the railroad runs, according to the actual mileage in each town and district. Materials and stores shall be assessed as personal property in the town or district where located on the first Monday in June the year for which the assessment is made."

And that said assignment was not made in complance with the Act of the Legislature creating said road improvement district, but was made under the provisions of an entirely different Act, and based upon an entirely different procedure from that upon which the County assessments are made, and for the reason that said assessment is violative of Section 1 of the Fourteenth Amendment to the Constitution of the United States heretofore referred to, and in violation of Section 11 of Article 17 of the Constitution of the State of Arkansas heretofore quoted.

14th. That Section 5 of the Act creating said road improvement district is unjust, inequitable and unfair, invalid and unconstitutional in so far as the same applies to the property of the St. Louis, Iron Mountain & Southern Railway Company, in that it provides for an arbitrary abuse of the rights of said Company, and is an attempted exercise of an arbitrary power of the legislature in determining, in advance, the benefits that would accrue to said property by the building of said proposed road without first providing a method for ascertaining the kind of road to be constructed, the cost and maintenance thereof, the necessity for, the country to be served and the probable benefits to the property to be taxed in connection therewith, and then following said procedure in securing such information as a basis upon which to determine the benefits.

15th. That the benefits assessed against the property of the St. Louis, Iron Mountain & Southern Railway Company

is inequitable, unfair and unjust, and far in excess of the benefits which it can ever hope to receive from the construction of said road, the length of said road not exceeding three and one-half miles, yet the aggregate benefits assessed against the property of said plaintiff, according to the method of valuation adopted by the board of commissioners and certified by the Secretary to the defendant, Tax Collector, herein, exceeds the sum, including interest, of over $12,000.-00; that as a matter of fact the construction of said road would not add anything whatever to the value of the property, and will not in any other way benefit, either directly or indirectly, the property of said railroad company; that said action of the legislature in arbitrarily declaring and fixing the benefits alleged to accrue to said property in proportion to the assessed valuation thereof, is in violation of Section 5 of Article 16 of the Constitution of the State of
21 Arkansas, and also of Section 1 of Article Fourteen of the Constitution of the United States heretofore referred to.

16th. That the Act of the Legislature creating said road improvement district, fixing and assessing the benefits for the purpose of securing funds to construct same, and the procedure to be followed in connection therewith is wholly void, for the reason that it does not provide for any notice or method for hearing, to the persons or corporations whose property is to be charged or assessed with the expense of the construction of said road, and is therefore in violation of Section 1 of Article 14 (14th Amendment) of the Constitution of the United States.

17th. Plaintiff further states that said Act 228, creating said road improvement district is in violation of Section 4 of Article 4 of the Constitution of the United States, in that it does not guarantee to the plaintiff the benefit of a republican form of government.

18th. That said Act 228, creating said road improvement district is unconstitutional and void, for the reason that it is a special Act, and was passed and approved in violation of Article 5 of Section 25 of the Constitution of the State of Arkansas, which provides:

"That no local or special bills shall be passed until notice of the intention to apply therefor shall have been published in the locality where the matter or thing to be affected may be situated, which notice shall be published at least thirty days prior to the introduction into the General Assembly of such bill, and in the manner to be provided by law. The

evidence of such notice having been published shall be exhibited in the General Assembly before such Act shall be passed."

The plaintiff states and alleges that no such notice was ever published before said Act was introduced in the General Assembly of Arkansas, and that the evidence of such notice and publication was not exhibited to the General As-
22 sembly before such Act was passed, and therefore alleges that said Act was passed and approved contrary to the provisions of the Constitution of Arkansas. And the plaintiff further states and alleges that said Section is a part of its articles of incorporation, and that it is entitled to the protection of same; it is a part of its contract with the State of Arkansas in connection with its charter, and that the legislature in passing said Act, contrary to said Section of the Constitution violated Section 1, Article 10 of the Constitution of the United States, and that said Act is in violation of Section 1 of Article 10 of the Constitution of the United States, which provides, in part:

"That no state shall pass any law impairing the obligation of a contract."

19th. That the terms and conditions of said Act in assessing the property of said Railway Company on a different basis, and contrary to the assessments made on other property in said district, is unreasonable and arbitrary, and that the burdens placed upon the railroad company by said Act are unreasonable, unjust, inequitable and arbitrary, and the alleged benefits by reason of the construction of said road or highway are in fact of no value whatever to said Railway Company, and do not aid or assist it in the operation of same, and that under said Act it does not receive the equal protection of the law, and here assert and allege that said Act is void and unconstitutional, for the reasons in this complaint stated, and especially because it deprives the plaintiff of the due process of law, and equal protection of the same, and is therefore in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, as hereinbefore stated.

20th. That said Act No. 228 is unconstitutional and void because it arbitrarily, without notice or investigation
23 and without providing a procedure for determining benefits, or hearing to the owners of property to be affected thereby, arbitrarily fixed a charge against said property, and especially the property of this plaintiff, which takes and appropriates the same for public use without compensation therefor, in violation of Section 22 of Article 2 of the Constitution of the State of Arkansas, which reads:

"The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use without just compensation therefor."

21st. That the assessment of benefits and [charged] entered against the property of this plaintiff for the construction of said road or highway is unjust, inequitable and void, and in violation of the Constitution of the United States and the Constitution of the State of Arkansas herein referred to, for the reason that the property of this plaintiff is charged and assessed upon a mileage basis, whereas all other property sought to be charged for said purpose within said district, is assessed and charged upon an acreage basis, and for that reason the amount charged and assessed against this plaintiff is far in excess of the amount charged against other property holders within said district, and amounts to and constitutes a discrimination against the property of the Railway Company.

22nd. Plaintiff further alleges that he has no adequate remedy at law, and will therefore suffer [irrepairable] loss and injury unless the defendants, and each of them, are restrained and enjoined from doing and performing the things herein complained of, and unless the defendant, J. H. Branson, Sheriff and Ex-officio Tax Collector, is restrained and enjoined from refusing to accept said county and other taxes due upon said property of the St. Louis, Iron Mountain &
24 Southern Railway Company, and that he be further enjoined from collecting or attempting to collect any portion of said road improvement district tax, and that his co-defendants, commissioners of the road improvement district, and each of them, and said road improvement district be enjoined and restrained from adding to the amount of said taxes the penalty of 25 per cent., as provided by Section 11 of said Act.

Wherefore your petitioner prays a temporary restraining order or injunction, restraining and enjoining defendant, J. H. Branson, Sheriff and Ex-officio Tax Collector for Crawford County, Arkansas, from collecting, or attempting to collect that portion of complainant's taxes which are charged and assessed against its property as benefits for the purpose of constructing and maintaining a road or highway provided for in Act No. 228 of the 1911 Session of the General Assembly of the State of Arkansas, and also enjoining and restraining the defendants constituting the board of commissioners for said road [didstricts] from certifying, entering or charging

the property of this complainant with the amount of said alleged benefits, or from adding to said amount the sum of 25 per cent. as a penalty on account of the failure of complainant to pay the same, and that said restraining order and temporary injunction be made to apply to the taxes or assessment made and entered against plaintiff's property within said district for the year of 1915, and for each succeeding year for a term of twenty years, and that upon final hearing in this case that said injunction be made permanent, and for all proper relief.

B. F. BUSH,
Receiver for St. Louis, Iron Mountain & Southern Railway Company, Plaintiff,
By Thos. B. Pryor and W. L. Curtis,
His Solicitors.

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25 Answer to Second Amended Bill in Equity.

(Filed in U. S. District Court January 27, 1917.)

Comes now the defendants and for answer to the plaintiff's second amended complaint, adopts his former answer herein and in addition thereto denies that there is any inequality in the assessment of said railway property and the property of individuals and other corporations within said District; denies that said railway assessment was not made in compliance with the Act creating said improvement district; denies that said assessment of said Railway Company was made under a different law than the assessment of other taxpayers in said improvement district; denies that said assessment of the plaintiff's property was made in violation of the 14th Amendment to the Constitution of the United States and denies that the same is in violation of Section 11 of Article 17 of the Constitution of the State of Arkansas.

Defendant further denies that Section 5 of the Act creating said road improvement district is unjust, inequitable or unfair, or is unconstitutional and void, and denies that it provides for an arbitrary abuse of the rights of said company; denies that the benefits assessed against the property of the St. Louis, Iron Mountain and Southern Ry Co., is inequitable,
26 unfair or unjust, or that the same is in excess of the benefits received by it, but allege that the Legislature of the state is the sole judge of such benefits and that its finding and enactment are conclusive of such benefits and that it has duly and fairly ascertained and apportioned the same; denies that said Act is in violation of Section 5 of Article 16 of the Constitution of the State of Arkansas and denies that the same is in violation of the 14th Amendment of the Con-

stitution of the United States; denies that the same is in violation of Section 4 of Article 4 of the Constitution of the United States; denies that the same is in violation of Section 25 of Article 5 of the Constitution of the United States; denies that no notice was published or given, the required length of time before said Act was passed by the Legislature of the State of Arkansas; denies that the judicial department of the state or Federal Government or either of them are clothed with authority to enquire into or determine what notice, was in fact given in said matter, but allege that said matter is a legislative question and that the determination of the Legislature in the same is final and conclusive; denies that said Act is in violation of Section 1 of Article 10 of the Constitution of the United States; denies that the property of the Railway in Crawford County is assessed upon a different basis from other property in said improvement district; denies that the said Act is void and unconstitutional for that reason, denies that the same is in violation of Section 22 of Article 2 of the Constitution of the State of Arkansas.

Further answering these defendants aver that this suit affects all of the taxpayers of said improvement district separately and individually in a manner different and other than the same affects the said improvement district as a corporation, upon, in and about the questions raised
27 in said complaint upon Sections 22 of Articles 2, 25 of Article 5, 5 of Article 16 and 11 of Article 17 of the Constitution of the State of Arkansas and Sections 4 of Article 4, 1 of Article 10 and Section 1 of the 14th Amendment to the Constitution of the United States, to as great an extent inclusive, as it does the rights of the plaintiff herein, and that they are directly interested in the result of this suit in that the determination thereof might release them from all liability or might cast upon them a financial burden as great as the decree might relieve the plaintiff. That said taxpayers are very numerous and it is impractical to make them all parties to this action but that their interests ought in equity and justice to be heard before the questions herein raised are determined. That relief of the burden of taxation given to plaintiff might and in some phases of the suit would cast the same burden upon the other taxpayers. That W. A. Bushmaier is a taxpayer of said district interested in the same way as other individual taxpayers, and is ready and willing to, and is a proper person to act and defend for all of the persons taxed as individuals.

These defendants suggest that he be made a party defendant herein with leave to act and defend for all individual taxpayers interested.

Wherefore, these answering defendants pray that the plaintiff take nothing by its said complaint and its said bill be dismissed for want of equity, and these defendants have and recover all of their costs in this behalf laid out and expended.

C. A. STARBIRD
Defendants Solicitor.

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28 Answer.

(Filed in U. S. District Court April 7, 1916.)

Comes now the above named defendants and for answer to the Amended Bill filed herein by the complainants deny that the amount in controversy in this action exceeds the sum of $3000.00 in value and denies that there is diversity of citizenship between the real parties in interest, to-wit: Saint Louis, Iron Mountain and Southern Railway Company and these defendants but avers that they are all citizens of the State of Arkansas. These defendants admit that the rolling stock of said Railway is personal property under the Constitution and laws of the State of Arkansas, and not taxable for the said improvement so made in Crawford County Road Improvement District Number Two, and the same was erroneously assessed in said assessment and erroneously certified to the said Collector and hereby offers to remit the same; deny that said assessment is in violation of the Due Process and Equal Protection clause of the Fourteenth Amendment of the Constitution [of the Constitution] of the United States; denies that the Secretary of the Board of Commissioners did not follow the provisions of Section 5 in said Act; denies that the Assessment of Benefits is not based upon the value of the property as shown by the last County Assessment but avers that the mileage of said Railway is legally assessable as a whole and that one mile
29 is as necessary to the use of said railway as another and as valuable and that its corporal lands and tenements as well as its incorporal hereditaments are properly assessable and taxable real estate and that the value of the same as so certified by the Arkansas Tax Commission when so certified to the county of Crawford is the last and becomes the last County Assessment within the meaning of said Act; denies that said method of assessment violates Section Five of Article Sixteen of the Constitution of the State of Arkansas and denies that the same violates the Equal Protection clause of the Fourteenth Amendment to the Constitution of the United States [Constitution] and de-

nies that the same violates Section Eleven, Article Seventeen of the Constitution of the State of Arkansas; denies that Section Five is unjust, invalid and unconstitutional as far as applied to the property of the Saint Louis, Iron Mountain and Southern Railway Company and denies that there is a manifest arbitrary abuse of the power of the Legislature in determining in advance the benefits that would accrue to their property by the building of said road; denies that the aggregate amount certified by the Secretary of the Commission and to be collected from plaintiffs corporation exceeds, excluding interest the sum of Twelve Thousand Dollars ($12000.00), but avers that excluding interest the sum amounts to less than Seven Thousand Dollars ($7000.00); denies that said property will not be benefited by said improvement; denies that said action of the Legislature of the State of Arkansas was an arbitrary abuse of power and denies that such action was and is in violation of either the Constitution of the State of Arkansas or the Fourteenth Amendment to the Constitution of the United States; denies that under the mode of assessment of railroad property in Crawford County, Arkansas, that the same is assessed at a higher rate than other property in said county; denies that the said assessment of benefits forces an unjust proportion of the expense of the improvement upon the property of the said Railway Company; denies that all property of companies and corporations in said District are assessed benefits upon an acreage basis and denies that the said Railroad is assessed upon a mileage basis; and denies that the assessment discriminates against the Railway Company, or forces upon it an unjust or unequal burden but avers that the same does not place upon it its just proportion of the benefits; denies that the same is in violation of Section Five of Article Sixteen of the Constitution of the State of Arkansas and denies that the same is a violation of the Fourteenth Amendment to the Constitution of the United States.

II. Further answering these defendants allege that there is a defect of parties defendant in this: That each taxpayer in the said District is interested in this action because his burden will be much larger in case complainant be granted the relief prayed for and because said judgment so prayed for would not conclude such taxpayers are made parties or some of them made parties as representatives of them if it be held that they are too numerous; and that there is a defect of parties defendant that the bondholders of said District, the William Compton Bond and Mortgage Company of Saint Louis, Missouri own the Bonds and the granting of the relief prayed

for would prejudice their rights by reducing their security, without giving them their day in court.

III. That complainant herein prays relief for the reason alleged by him that an unjust proportion of the burden
31 of such assessment of benefits is cast upon him and upon said Railway Company, but has not paid, or offered to pay, and does not now offer to pay a just part of said burden, and has not offered and does not offer to do equity.

Wherefore defendants pray that complainants Bill filed herein and the amended Bill be dismissed for want of Equity, and that they have and recover their cost herein laid out and expended and all other just and proper relief.

Defendants' Solicitor.

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32 Motion for Additional Parties Defendant.

(Filed in U. S. District Court January 27, 1917.)

Come now the defendants and move the court to make additional parties defendant herein as prayed in their last amended answer, for the reasons set forth therein.

C. A. STARBIRD,
Defendants' Solicitor.

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33 Amendment to Answer.

(Filed in U. S. District Court March 1, 1917.)

Two years before the bringing of this suit the defendant road district issued its negotiable bonds in the sum of twenty-one thousand ($21,000), and with the proceeds thereof built the road. The plaintiff knew of the building of the road, and made no objection thereto. The bonds have passed into the hands of innocent purchasers; and the defendants say that the plaintiff is estopped by its conduct to maintain this suit.

C. A. STARBIRD,
ROSE, HEMINGWAY, CANTRELL, LOUGHBOROUGH & MILES,
For Dft.

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34 Cross-Complaint of W. A. Bushmaier, Intervenor.

(Filed in U. S. District Court March 1, 1917.)

B. F. Bush, as Receiver of the St. Louis, Iron Mt. & Southern R. Co., et al, Plaintiffs,
vs.
J. H. Branson, as Collector, et al, Defendants,
and
W. A. Bushmaier, Intervenor.

Comes now the said intervenor and with leave of court first obtained, and pleading for himself as well as for all other taxpayers of said District, Road Improvement District Number 2, adopts all of the complaint and amended complaint of the plaintiff herein, except that he denies that the assessment of the said Railway Company is unjust, inequitable or unfair as between the said Railway Company and the other taxpayers of the said Improvement District, but alleges that the said assessment and tax is fair and just and is levied uniformly upon all of the real property of the Improvement District according to the benefits received by the same.

J. E. LONDON,
Solicitors for Intervenor.

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35 Order making W. A. Bushmaier party defendant; Order of submission.

(Entered in U. S. District Court March 1, 1917.)

Benjamin F. Bush, as receiver for the St. Louis, Iron Mountain & Southern Railway Company, Plaintiff,
No. 259. vs. Equity.
J. H. Branson, Sheriff and Ex-officio Tax Collector of Crawford County, Arkansas, and J. J. Cravens, W. B. Smith and R. F. Hamer, Commissioners of Crawford County Road Improvement District Number 2, and Crawford County Road Improvement District Number 2, Defendants.

This March 1, 1917, comes the plaintiff by T. B. Pryor, Esq., his solicitor, and come the defendants by C. A. Starbird, Esq. and G. B. Rose, Esq., their solicitors, and on consideration of defendants' motion heretofore filed to make additional parties defendant, it is ordered that W. A. Bushmaier be and is hereby made a party defendant herein; and defendants by leave of court file an amendment to their answer herein.

Comes also W. A. Bushmaier as intervenor by T. J. Wear, his solicitor, and by leave of court files cross complaint in the above entitled cause.

Whereupon, the parties plaintiff and defendant appearing by their solicitors this cause comes on to be heard, and the evidence being introduced the cause is argued by counsel and submitted.

FRANK A. YOUMANS, Judge.

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36 Decree.

(Entered in U. S. District Court March 17, 1917.)

B. F. Bush, Receiver for the St. Louis, Iron Mountain & Southern Railway Company, et al, Plaintiffs,
No. 259. vs. Equity.
J. H. Branson, Sheriff and Ex-officio Tax Collector of Crawford County, Arkansas, and J. J. Cravens, W. B. Smith and R. F. Hamer, Commissioners of Crawford County Road Improvement District Number 2, and Crawford County Road Improvement District Number 2, Defendants.

This cause having been set down for hearing on the 1st day of March, 1917, and the plaintiffs being present by their attorneys and solicitors, and the defendants being present by their attorneys and solicitors, this case was submitted to the court upon the plaintiff's bill of complaint, and the defendant's answer thereto, and the testimony offered in support thereof, after which the court took the case under advisement.

And now on this the 17th day of March, 1917, when present the plaintiffs and the defendants by their respective attorneys and counselors, in open court, the court finds that the plaintiff's bill of complaint should be sustained, and that the injunction heretofore issued in this case should be made permanent in so far as the same relates to the personal property of the plaintiff, Railway Company, and that the same should be dissolved and the plaintiff's bill of complaint dismissed for want of equity in so far as the same relates to the real
37 estate of said Railway Company.

It is therefore considered, ordered and decreed by the court that the temporary restraining order and injunction heretofore issued in this case, be, and the same is hereby made

permanent in so far as the same relates to the personal property consisting of and designated as rolling stock and material belonging to the complainant, and that said temporary restraining order and injunction be, and the same is hereby dissolved, and plaintiff's bill of complaint dismissed for want of equity in so far as the same relates to the real estate of the plaintiff Railway Company, said real estate being designated in the bill of complaint as main track, side track, and buildings.

It is further ordered, adjudged and decreed by the court that plaintiff have and recover of and from the defendants, all of their costs in and about this suit laid out and expended. To the entering of said judgment and decree by the court in so far as the same pertains to, and provides for the dissolution of the temporary restraining order and injunction, and the dismissal of plaintiff's bill of complaint as to the real estate, the plaintiff excepts and prays an appeal.

The said plaintiff, Railway Company, being present through its attorneys and counselors, in open court, at the time of the rendition of the above decree and judgment, gives notice in open court of their intention to appeal from this court to the United States Circuit Court of Appeals for the Eighth Circuit, from so much of said judgment and decree as dissolves that portion of the temporary restraining order and injunction that relates to the real estate of said plaintiff, Railway Company,
which said notice is noted of record, and the appeal al-
38 lowed, and upon application of plaintiff, and for good
cause shown, it is allowed ninety days in which to prepare and file its Bill of Exceptions, and said plaintiff, Railway Company, through its said attorneys and solicitors, having applied to the court, in open court, at the time of the rendition of this decree and judgment for an order reinstating and continuing the temporary restraining order and injunction heretofore issued in this case, pending appeal, and the court after hearing the same, and being fully advised in the premises, doth grant and allow said application, conditioned upon the plaintiff, Railway Company, filing a good and sufficient supersedeas bond within thirty days from this date, in the sum of $1000.00, conditioned as required by law.

FRANK A. YOUMANS,
United States District Judge for the
Western District of Arkansas.

39 Petition for Appeal.

(Filed in U. S. District Court March 17, 1917.)

Comes the plaintiff, B. F. Bush, Receiver, and prays an appeal from the judgment rendered herein, to the Circuit Court of Appeals.

B. F. BUSH,
Receiver, Plaintiff,
By W. L. Curtis,
Thos. B. Pryor,
Attorneys.

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40 Assignment of Errors.

(Filed in U. S. District Court March 17, 1917.)

Now comes the plaintiffs in the above entitled cause and files the following assignments of error, upon which they rely upon their prosecution of the appeal in the above entitled cause, from the decree made by this Honorable Court on the .... day of March, A. D. 1917.

1st. The United States District Court for the Western District of Arkansas, Fort Smith Division, erred in finding in effect as a matter, both of fact and law, that the Charter between the Cairo & Fulton Railway Company and the St. Louis, Iron Mountain & Southern Railway Company and the Constitution of the State of Arkansas, under which the same was granted, did not constitute such a contract as between the State and the Railway Companies as to entitle plaintiff, Railway Company, to the relief sought in its bill of complaint.

2nd. The United States District Court for the Western District of Arkansas, Fort Smith Division, erred in holding, both as a matter of fact and as a matter of law, that Sections
41 1, 2, 3, 5, 6, and a part of Section 11 of Act Number 228 of April, 1911 of the General Assembly of the State of Arkansas, being entitled "An Act to create Crawford County Road Improvement District Number 2" was not in violation of Section 1 of Article 14 of the Fourteenth Amendment to the Constitution of the United States, and of Section 5 of Article 16 of the Constitution of the State of Arkansas, and in conflict with Section 6906 of Kirby's Digest of the Statutes of Arkansas, and in conflict and in violation of Section 11 of Article 17 of the Constitution of the State of Arkansas, and Section 25 of Article 5 of the Constitution of the State of Arkansas, and Section 4 of Article 4 of the Constitution of the

United States, and Section 1 of Article 10 of the United States, and of Section 22 of Article 2 of the Constitution of the State of Arkansas.

3rd. The United States District Court for the Western District of Arkansas, Fort Smith Division, erred in holding, in substance, as a matter of fact and as a matter of law, that the fact that the real estate located within the road improvemen district other than that belonging to the plaintiff, railway company, was made up from an assessment prepared by the County Assessor, while the assessment against the plaintiff, railway company, was taken from an assessment made by the tax commission of the State of Arkansas, under the provisions of the Act of the General Assembly of the State of Arkansas, entitled: "An Act to provide the manner of assessing for taxation the property of Railroads, Express, Sleeping Car, Telegraph, Telephone and Pipe Line Companies", approved May 4th, 1911, was not such a departure from the provisions of Act Number 228 passed by the General Assembly of the State of Arkansas in April, 1911, and entitled "An Act to create Crawford County Road Improvement District Number 2", as would invalidate said as-
42 sessment, and constitute a violation of the plaintiff, railway company's right, under the Sections of the Constitution of the State of Arkansas and of the United States referred to in plaintiff's assignment of error Number 2.

4th. The United States District Court for the Western District of Arkansas, Fort Smith Division, erred in holding as a matter of fact, and as a matter of law, that the fact that the plaintiff, railway company's property was assessed upon a mileage basis, and that the remaining real estate within said improvement district was assessed upon an acreage basis, is not such a discrimination against the plaintiff, railway company, and in favor of other real estate located within said district as to invalidate such assessment, and to constitute a violation of plaintiff, railway company's rights under the Sections of the Constitution of the State of Arkansas and of the United States, referred to in plaintiff, railway company's assignment of error Number 2.

5th. The United States District Court for the Western District of Arkansas, Fort Smith Division, erred in holding as a matter of fact, that the construction of the road, under the terms and provisions of the Act of the General Assembly of the State of Arkansas, Number 228, entitled "An Act to create Crawford County Road Improvement District Number 2',' added anything to the value of the plaintiff, rail-

way company's property, or in any way facilitated its operation, or that said railway company, either directly or indirectly, received any benefits, either upon the basis of increased valuation of its property or in the way of facilitating its operation, or by the enhancement of its revenues.

6th. The United States District Court for the Western District of Arkansas, Fort Smith Division, erred in
43 holding in effect, as a matter of law, that a legislative determination and assessment of property, and of benefits is conclusive upon the property within the improvement district, notwithstanding the fact that the Act creating such a district no where provides for notice of hearing at which the owners of property within said district may complain on account of the amount assessed against their property, or the benefits which it is estimated it will receive by reason of such improvement.

7th. The United States District Court for the Western District of Arkansas, Fort Smith Division, erred in holding, as a matter of law, that the property of the plaintiff, railway company, can be charged with the expenses of building that portion of the improvement which extends out South, and out side of said district.

8th. The United States District Court for the Western District of Arkansas, Fort Smith Division, erred in holding, as a matter of law, that the plaintiff, railway company, is precluded by the Act of the General Assembly, Number 228, from raising the question as to whether or not Section 25 of Article 5 of the Constitution of the State of Arkansas, providing for the publication of notice of the intention to apply therefor, in the locality where the matter or thing to be affected may be situated, at least thirty days prior to the introduction into the General Assembly of such a bill and exhibition of the evidence of the publication of such notice on the floor of the General Assembly, before such Act shall be passed, and especially in this case, wherein the Act arbtrarily fixes a basis of valuation upon the property of plaintiff for taxation or assessment, and also arbitrarily makes
44 a finding as to the benefits which is to be charged against plaintiff's property, and in which there is no other provisions for notice, or no other opportunity given plaintiff for a hearing at which protest or complaint on account of the valuation placed upon its property, and the basis of assessment of benefits to be charged against same, may be had.

Wherefore the appellant prays that said decree in so far as the same dismisses and disallows its application for injunction, and dismissing its bill for want of equity as to the real estate involved in said suit, be reversed and that said District Court for the Western District of Arkansas be ordered and directed to enter a decree allowing and granting the appellant the relief prayed for in its bill of complaint.

THOS. B. PRYOR
Attorneys for Plaintiff in Error.

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45 Order Allowing Appeal.

(Entered in U. S. District Court March 17, 1917.)

On motion of Thomas B. Pryor, Esquire, Solicitor and counsel for plaintiff, it is hereby ordered that an appeal to the Circuit Court of Appeals for the Eighth Circuit of the United States, from the decree heretofore filed and entered herein, be, and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and proceedings be forthwith transmitted to said Circuit Court of Appeals.

It is further ordered that the bond on appeal be fixed at the sum of $250.00, and that in addition thereto, a supersedeas bond for the restoration and continuing of the temporary injunction heretofore issued in this case, during the pendency of the appeal be fixed at the sum of $1000.00, and to be approved and filed herein within 30 days from this date.

Dated this the 17th day of March, 1917.

FRANK A. YOUMANS,
United States District Judge for the
Western District of Arkansas.

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46 Cost Bond on Appeal.

(Filed in U. S. District Court March 17, 1917.)

Know All Men By These Presents:

That we, Benjamin F. Bush, Receiver for the St. Louis, Iron Mountain & Southern Railway Company, as principal, and I. D. Thomas and I. H. Nakdimen as sureties, of the County of Sebastian, in the State of Arkansas, are held and firmly bound unto, J. H. Branson, Sheriff and Ex-officio Tax Collector of Crawford County, Arkansas, and J. J. Cravens, W. B. Smith and R. F. Hamer, Commissioners of Crawford

County Road Improvement District Number 2, and Crawford County Road Improvement District Number 2, in the sum of $250.00, lawful money of the United States, to be paid to them, and their respective executors, administrators and successors, to which payment well and truly to be made, we bind ourselves, and each of us jointly and severally and each of our heirs, executors and administrators by these presents.

Sealed with our seals and dated this the 16th day of March, 1917.

Whereas, the above named Benjamin F. Bush, Re-
47 ceiver for the St. Louis, Iron Mountain & Southern Railway Company, has prosecuted a writ of error to the United States District Court from the Western District of Arkansas, Fort Smith Division to the United States Circuit Court of Appeals for the Eighth Circuit, in the above cause.

Now, therefore, the condition of this obligation is such, that if the above named Benjamin F. Bush, Receiver for the St. Louis, Iron Mountain & Southern Railway Company, shall prosecute his said appeal to effect, and answer all costs if he fails to make good his appeal, then this obligation shall be void, otherwise to remain in full force and effect.

BENJAMIN F. BUSH,
Receiver for the St. Louis, Iron Mountain & Southern Railway Company, Plaintiff,

By Thos. B. Pryor
Solicitor.

I. D. THOMAS
I. H. NAKDIMEN

State of Arkansas
County of Sebastian.—ss.

On the 16th day of March, 1917 personally appeared before me I. D. Thomas and I. H. Nakdimen respectively known to me to be the persons described in, and who duly executed the foregoing instrument, as parties thereto, and respectively acknowledged, each for himself, that they executed the same as their free and voluntary act and deed for the purposes therein set forth, and the said I. O. Thomas and I. H. Nakdimen being respectively by me duly sworn, says each for himself, and not one for the other, that he is a resident and householder of the said County of Sebastian, State of Arkanasas, and that he is worth the sum of $250.00 over and

above his just debts and legal liability and property
48 exempt from execution.

I. D. THOMAS
I. H. NAKDIMEN

Subscribed and sworn to before me on this the 16th day of March, 1917.

(Notarial Seal) F. H. FENNESSY
Notary Public.

My commission expires Jany 16, 1920.

The within bond is approved, both as to sufficiency and as to form, 17th day of March, 1917.

FRANK A. YOUMANS,
United States District Judge for the Western District of Arkansas.

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49 Supersedeas Bond.

(Filed in U. S. District Court March 17, 1917.)

Know All Men By These Presents:

That we, Benjamin F. Bush, Receiver for the St. Louis, Iron Mountain & Southern Railway Company, as principal, and I. D. Thomas and I. H. Nakdimen as sureties, are held and firmly bound unto J. H. Branson, Sheriff and Ex-office Tax [Collection] of Crawford County, Arkansas, J. J. Cravens, W. B. Smith and R. F. Hamer, Commissioners of Crawford County Road Improvement District Number 2, and Crawford County Road Improvement District Number 2, in the full and just sum of $1000.00 to be paid to the said J. H. Branson, Sheriff and Ex-officio Tax Collector of Crawford County, Arkansas, and J. J. Cravens, W. B. Smith and R. F. Hamer, Commissioners of Crawford County Road Improvement District Number 2, and Crawford County Road Improvement District Number 2, their heirs, executors, administrators, successors or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors or assigns jointly and severally by these presents.

Sealed with our seals, and dated this .. day of March, A. D., 1917.

Whereas, lately at the January Term of the United
50 States District Court for the Western District of Arkansas, Fort Smith Division, in a suit pending in said

court between Benjamin F. Bush, Receiver for the St. Louis, Iron Mountain & Southern Railway Company, plaintiff vs. J. H. Branson, Sheriff and Ex-officio Tax Collector of Crawford County, Arkansas, and J. J. Cravens, W. B. Smith and R. F. Hamer, Commissioners of Crawford County Road Improvement District Number 2, and Crawford County Road Improvement District Number 2, defendants, a decree and judgment was rendered against the plaintiff dissolving a temporary restraining order and injunction theretofore issued in said case, and dismissing plaintiff's bill of complaint in so far as the same related to certain taxes against the real estate described therein, and the said plaintiff having secured and obtained an allowance of an appeal in said case to the United States Circuit Court of Appeals for the Eighth Circuit, to reverse that portion of the judgment and decree of United States District Court for Western District of Arkansas, Fort Smith Division, hereinabove referred to in the aforesaid suit.

Now, the condition of the above obligation is such that if the said Benjamin F. Bush, Receiver for the St. Louis, Iron Mountain & Southern Railway Company, shall prosecute his said appeal to effect and answer for all damages and costs if he fails to make plea, and shall pay all sums which he may be adjudged to pay by reason of or on account of said suit, and said appeal, and any damages that might result to said defendants, as determined by the court by reason of or on account of the reinstating and continuing of the temporary restraining order and injunction herein, pending appeal,
51 then the above obligation to be void, else to remain in full force and effect.

Sealed and delivered in the presence of:

B. F. BUSH,
Receiver for the St. Louis, Iron Mountain & Southern Railway Company, Plaintiff,
By Thomas B. Pryor, Solicitor.

I. D. THOMAS,
I. H. NAKDIMEN.

State of Arkansas,
County of Sebastian—ss.

On the 16th day of March, 1917, personally appeared before me I. D. Thomas and I. H. Nakdimen respectively known to me to be the persons described in, and who duly executed the foregoing instrument, as parties thereto, and respectively acknowledged, each for himself, that they executed the same as

their free and voluntary act and deed for the purposes therein set forth, and the said I. D. Thomas and I. H. Nakdimen being respectively by me duly sworn, says, each for himself, and not one for the other, that he is a resident and householder of the said County of Sebastian, State of Arkansas, and that he is worth the sum of $1000.00 over and above his just debts and legal liability and property exempt from execution.

I. D. THOMAS,
I. H. NAKDIMEN.

Subscribed and sworn to before me on this 16th day of March, 1917.

(Notarial Seal)

F. H. FENNESSY,
Notary Public.

My Com. ex Jany 16, 1920.

The within bond is approved, both as to sufficiency and as to form, 17th day of March, 1917.

FRANK A. YOUMANS,
United States District Judge for the
Western District of Arkansas.

52

Bill of Exceptions.

(Filed in U. S. District Court May 3, 1917.)

On the 1st day of March, A. D. 1917 this cause came on to be heard before the Honorable Frank A. Youmans, Judge of the United States District Court for the Western District of Arkansas, when present the plaintiff by T. B. Pryor and W. L. Curtis, Attorneys, and the defendants by C. A. Starbird and George B. Rose, their attorneys; whereupon both parties announced ready for trial.

The plaintiff thereupon offered in substance, in support of its bill of complaint, the following testimony, to-wit:

R. C. WHITE, being first duly sworn, testified in substance:

That he was Engineer of Maintenance of Way of the St. Louis, Iron Mountain & Southern Railway Company from October, 1914 to January 1st, 1917, and that his duties as such Engineer of Maintenance of way was handling engineering matters in this Southern District, composed of six divisions, which included improvement matters in a general way, of the property, and also the handling of improvement district matters along the line in connection with Drainage districts and

Road districts, and that the plaintiff's line of road between Little Rock, Arkansas and Van Buren, Arkansas, was a portion of the plaintiff's property which came under his jurisdiction. That he is, in a general way, familiar with the road which it is proposed to be improved under the Act of the General Assembly of the State of Arkansas of 1911, creating Crawford County Road Improvement District Number 2; that said road is approximately three and one-half miles in length. Does not recall the exact amount of plaintiff's property included within the District nor the total amount of the cost of said improvement which plaintiff will be required to pay, but does recall that under the assessment it was estimated by his
53 department soon after the passage of the Act of the General Assembly creating the District, that plaintiff would be required to pay approximately 28% of the cost of the entire improvement; that he has been connected with the plaintiff Company ten years, and that as before stated, he is in a general way familiar with the location of the proposed road. and that said road is not now, and will never be of any benefit to the plaintiff; that it has not enhanced the value of plaintiff's property or the value of the Railroad in any way, and it does not in any way facilitate the operation of trains over the plaintiff's railroad, and it is of no direct benefit to the Railway. That said road begins at Alma and runs down to an East and West Road, that is to a public road that runs East and West with its Western terminus at the City of Van Buren. The East and West road referred to runs between the Arkansas River and the Mountains, and is a public road, and is a road over which a considerable volume of business is carried in and out of Alma. That the St. Louis, Iron Mountain & Southern Railway Company is the only railroad that runs in and out of Alma; that when you reach Van Buren you have also the Frisco Railroad, which is the only railroad competition plaintiff has at that point. That it is something like six miles South of Van Buren to Ft. Smith. To a limited extent the people who are benefited by the construction of the proposed road are the ones who live along the line that runs to this East and West road, and the people who live along that particular road. I estimated that the construction of the proposed road would cost about $9,800.00, which, upon our estimate would have required plaintiff topay an aggregate of $450.00 a year until the road was paid for. I knew this road was going to be built. It was built either the latter part of 1914 or early part of 1915. I cannot say as to whether or not plaintiff enjoined the collection of taxes or the issuance of the bonds or the expenditure of the proceeds of a sale thereof. The people served by this proposed road would have a great deal further to go if they

did their business at Van Buren than they would if they did it at Alma. This proposed road is approximately three and one-half miles long and intersects the main East and West road as heretofore stated, three and one-half miles due South of Alma, and the distance from Alma to Van Buren by the dirt road is approximately 11 miles, or if the people using this proposed road should go to Van Buren instead of Alma they would be required to travel approximately eight and one-half miles further than if they were to go to Alma. This proposed road is approximately three and one-half miles long and intersects the main Fort Smith and Little Rock road at its South end, 3½ miles South of Alma. And if people using this proposed road were to go to Van Buren instead of to Alma they would travel 4½ miles farther. (From South end of road to Van Buren 8 miles to Alma 3½ miles, difference 4½ miles.)

WALLACE OLIVER, after being duly sworn as a witness, testified in substance:

That he lived at Van Buren, Arkansas, and is and has been for two years County Clerk of Crawford County, and as such is custodian of the files and records of Crawford County. That he has examined the records and files of his office with reference to a list of the property returned by the Board of
54 Commissioners of Crawford County Road Improvement District Number 2 for the year of 1915, and was unable to find any record pertaining thereto. That he does not know how the road Commissioners of Crawford County Road Improvement District Number 2 secured or kept the valuation of the railroad property any more than they made a list. I don't know who the Commissioners are. I do know in 1915 they had a list of the property subject to taxation in the district, but I don't recall whether they filed it or not. I have no records pertaining to the taxable property of the St. Louis, Iron Mountain & Southern Railway Company in Crawford County for the year of 1915 with the exception of the list filed by the Tax Commissioners of Arkansas, which was handed to me by the County Assessor. I have examined the list prepared by the Tax Commissioners of Arkansas and find that there is no estimate or calculation in said list showing the extent of the property of the St. Louis, Iron Mountain & Southern Railway Company in Crawford County Road Improvement District Number 2, nor the value thereof. (Said list was marked for identification and admitted in evidence.)

On cross-examination witness stated in substance:

That said list does disclose a valuation of the property of the St. Louis, Iron Mountain & Southern Railway Company

in Crawford County on a per mile basis both for the main line and side track, and for also the personal property and rolling stock. This assessment list was handed to me by the Secretary of the Arkansas Tax Commission and is the assessment upon which the levy of state and county taxes is made for that year. This is the only assessment of railroads we have for county purposes.

JOHN O'BRIEN, after being sworn, testified in substance:

That he lives at Van Buren, and is in the employment of the St. Louis, Iron Mountain & Southern Railway Company in the Engineering department, and has charge of the engineering matters between Little Rock and Coffeyville, and has been engaged in Civil Engineering since the Spring of 1911, and is acquainted with the road to be improved in what is known as Crawford County Road Improvement District Number 2. Has prepared a map or plat showing the territory embraced in said road improvement district, the location of the improved road, also the location of plaintiff's property in said district, and its relation to said road; a copy of said map and plat being offered and admitted in evidence and marked for identification. The boundaries or out lines of said district are marked on the map in red, and the road, yellow.

All of the road to be improved is not within the district. Part of it extends outside the line of the district, the exact portion being between one eighth of a mile and a quarter of a mile, the entire length of the road is a little less than three and one-half miles. I made an investigation in 1914 of the assessed valuation of all property within the district, also as to the amount of the assessed valuation of plaintiff's property within the district, and estimated the probable cost
55 of improving said road, and found that upon that basis plaintiff would be required to pay 28% of the probable cost of constructing same. If the assessment had been made upon an acreage basis the plaintiff would have been assessed upon 53 acres while there is 7700 acres in the entire district, and if plaintiff's property had been assessed upon an acreage basis in proportion to other property in the district that they would have have been required to pay 7 and 1.10 of one per cent instead of 28% under the plan which was adopted for the assessment, in other words, 7 and 1.10 of one per cent of the acreage composing the district, which belongs to the plaintiff, Railway Company, was assessed at 28% of the entire cost of the proposed improvement. I do not believe that the improvement of the road within said road improvement district was of any benefit to the Railway Company, and it did not facilitate

the operation of trains over the road, nor increase the value of property. No portion of the road connects with the right of way of the Railway Company, and is about a quarter of a mile from the Northern end of said road to the Railroad right of way. There is quite a considerable portion of the construction work upon this proposed road already completed. I am not familiar with the gas matters in the Kibler field, but the discovery of the gas has developed considerable activity in the movement if large machinery and things like that. I do not know anything about the revenue derived from transportation of that gas machinery, but, of course, we derive a revenue from the transportation. That has been recently, since the discovery of gas, in the last 12 or 18 months. There has been a large amount of machinery, consisting of gas pipe and other machinery unloaded at Alma and transported over this proposed road to the gas field. The road for which this district was organized to improve, as I understand it, a pretty fair good road. The construction of the improvement began in the latter part of 1914.

W. C. Morse, being duly sworn as a witness, testified in substance:

That he is Superintendent of the St. Louis, Iron Mountain & Southern Railway Company, and that he had been connected with said Company since 1882. That he was at Wynn, Ark. six or seven years, and that as Superintendent, matters affecting property of the Company comes under his jurisdiction; that he is familiar with the matters in controversy growing out of the proposed improvement in connection with Crawford County Road Improvement District Number 2. That he has looked over the proposed road as well as the location thereof; that he does not see how the construction of said improvement could be of any benefit to the Railway Company; that there is no way by which the construction of said road could or would be of special benefit to the Railroad Company or its property.

On cross-examination witness stated:

That he was located at Van Buren, and from what he can see from the Railroad the country seems to be pretty well settled up South of the Railroad and between Alma and Van Buren. The St. Louis, Iron Mountain & Southern Rail-
56 way Company runs through the town of Alma and from Alma to Van Buren; that there is no railroad competition after you leave Alma until you reach Van Buren, there you strike the Frisco.

R. E. WARDEM after being duly sworn, in substance stated:

That he lived at Little Rock, Arkansas, and is Assistant Engineer of the St. Louis, Iron Mountain & Southern Railway Company, and has been connected with the system about 20 years; and that he has made investigation of Crawford County Road Improvement District Number 2 along the Iron Mountain Road, and is familiar with the proposed road to be improved under the Act of the Legislature organizing Crawford County Road Improvement District Number 2 in a general way. Witness was then handed (Exhibit No. 2) a map, and continued—in a general way I am acquainted with the situation of the Iron Mountain road passing through the town of Alma and also of the proposed road to be constructed in Crawford County Road Improvement District Number 2; that the construction of said road will not, and did not enhance the value of the property of the plaintiff in any way, or any portion thereof, and did not and does not facilitate its operation; that the net cost of the construction of said improvement or road was $19,272.00.

R. H. BURROUGH was sworn as a witness, and testified in substance:

That he resided at Ozark, Arkansas, and that he is publisher of the paper that is published at Alma, and has published said paper for a little over four years, and that his paper is the only one that is published in the town of Alma. That he has carefully examined the files of said paper and is unable to find that any notice was published therein of the application or intention to apply for the passage of the Act of the Legislature creating Crawford County Road Improvement District Number 2.

The deposition of Secretary of State, TOM J. TERRAL, which included (Exhibit A) a copy of an Act to Incorporate the Cairo & Fulton Railway Company, approved January 12, 1853 and (Exhibit B) a copy of the agreement of the Consolidation of the St. Louis and Iron Mountain Railroad Company with the Cairo and Fulton Railroad Company under the name of St. Louis, Iron Mountain & Southern Railway Company, which was filed in the office of the Secretary of the State of Arkansas June 12, 1874, was offered and admitted in evidence. The principal question referred to and made a part of said
57 agreement pertinent to the issues herein, is in Section 2 of Article 6 of the new or consolidated corporation, which in part reads:

"Section 2. Upon the [consumation] of said act of consolidation as provided by law, all and singular the rights, privileges and franchises of each of said corporations, parties thereto, and all other property, real personal and mixed, * * * * * * shall be taken and deemed to be transferred to, and vested in the St. Louis, Iron Mountain & Southern Railway Company, and such new corporation without further act or deed."

This witness further testified, in response to Interrogatories propounded, that he had examined all of the records of the Department of the Secretary of State which might, or could have any record or information in regard to Act Number 228 passed and approved in 1911 entitled "An Act Creating Crawford County Road Improvement District Number 2," and do not find therein any mention or any information whatever that would tend to show that any notice was given of the introduction of this Act in the Legislature.

It was agreed by counsel for both plaintiff and defendants, that the statement of Thos. B. Pryor in open court with reference to what knowledge, if any, the plaintiff had of the issuance and sale of the bonds with which to secure the funds to construct the improvement in question and the expenditure of said funds, which was in substance:

"I made an investigation of this (that is prior to the latter part of 1914 or the early part of 1915), I cannot remember how long before this. I remember that Judge Hill represented the contractors, and we discussed the feasibility of building the road under the Act creating Crawford County Road Improvement District Number 2, of the Acts of 1911. Judge Hill stated to me that he did not believe that the Commissioners would be able to get the contractors, whom he represented, to take the contract and look to the bonds to be issued for the payment of the cost of the construction of the road; that the Commissioners were making an effort to do so, but that he had advised his clients, the contractors, against the proposition. We discussed the matter several times, and he suggested that he would keep me advised as the matter progressed. I had no further information from him, and knew nothing at the time of the contract be-
58 ing let, or of any effort on the part of the Commissioners to obtain a contract on any other terms for the building of the road. The next information I had in regard to it was that the bonds had been sold, and that considerable work had been done on the road."

should be taken and considered as evidence in the case.

Here plantiff rested.

(Testimony for Defendants)

J. R. CRIGLER was called as a witness for the defendants, who testified in substance:

That he resides at Alma, Arkansas, and was engaged in the practice of medicine, and is acquainted with Crawford County Road Improvement District Number 2, as well as all other roads going out of Alma; that he is particularly acquainted with the road upon which this improvement was made, and that in wet times, before the improvement was made, it was some times practically impassible; there were times in March, and for three or four months it was almost impassible with a wagon. The greater per cent of the people adjacent to the town of Alma, or in its trading territory used this road in coming to and going from Alma; that there was more travel over this road than all the other three roads leading into and out of the town; that there is a considerable body of bottom land South of the East and West road which this improved road connects with the town of Alma, and the people residing thereon, prior to the construction of said improvement, in bad weather went to Van Buren, while in good weather they came to Alma, and are now making Alma their trading point and market the year round. Within a few miles of the Southern terminus of this improved road, and in the year of 1914 a large gas belt was discovered, all of which is tributary to this road, and probably some of the gas pipe used in the gas field was shipped to and unloaded at Alma, and carried out over this road. Lived at Alma at the time this improvement district was created, and remembers that quite a number of cars of material was shipped to and unloaded at Alma for the construction of said road. All produce brought into Alma over this road is shipped out over the Iron Mountain Ry., and all goods hauled out over this road are shipped into Alma over the Iron Mountain Ry. My opinion is that the road is a benefit to the Railroad.

On cross-examination witness stated in substance:

That he had traveled over this improved road as far back as 1911 or 1912, and that in the dry season it was as good as any ordinary country road. That they begun the construction of the improvement during 1915; they probably did some surfacing in 1914; that he owns no real estate in the district but is interested in the road as he goes over it every day.

J. J. CRAVENS then being duly sworn, testified in substance:

That he was engaged in the general mercantile business at Alma, Arkansas, and also buys and sells farm pro-
59 duce, and is one of the Commissioners of Crawford County Road Improvement District Number 2, and has resided in Alma for something near thirty years this fall, and is familiar with the roads in and out of the town, and also the one made by the improvement district; that there are four roads in and out of Alma, but that this improvement district road carried from fifty to sixty per cent of the traffic; that they had a road there before it was improved—a fairly good road except in wet weather, but sometimes it was almost impossible to get through. I have known six mules to stall with five bales of cotton on it. This road intersects with the road from Van Buren to Yoestown, three and one-half miles South of Alma. I have been in the mercantile business going on 20 years. I believe that 50 per cent of the produce coming in and merchandise going out of Alma goes over this road. I believe the building of the road increased the tonnage of the Iron Mountain road. It was built of macadam. As to the tonnage, I don't know the amount of that, or the amount of gas pipe or drilling machinery or the amount of stuff that goes out of Alma. Practically all farm produce hauled into Alma over this road is shippped out over the Iron Mountain Ry., and all merchandise hauled out over this road is shipped into Alma over the Iron Mountain Ry. In my opinion the improvement is a benefit to the Railroad. I don't know the amount of that (material shipped in for the Improvement over I. M. Ry.) but it was Thirty or Forty carloads.

On cross-examination the witness stated in substance:

I canot say as to whether or not the revenues on the Railroad at Alma will be increased by the improvement of this road. I am under the impression that they would be. I don't know. If the country served by this road had no way of getting into Alma, and would be required to ship their stuff in and out of Van Buren, I could not say as to whether or not it would affect the revenues of the Railroad. Would be required to ship their stuff in and out of Van Buren. I think it would make a difference. Van Buren is a competing point. There are other railroad facilities there. Cotton is what is called the money crop in that section. The agricultural section adjacent to Alma is South of the South end of this road, and about 50 per cent of the business of the town comes from

that direction, but I cannot say as to whether or not the production has increased since the construction of the road or not.

I. S. HAMER was sworn, and in substance testified:

That he lived near Alma and had lived there for thirty-six years, and is acquainted with Crawford County Road Improvement District Number 2, and is a farmer. Knows the road that has been improved there since it has been in use, and it is now a good road. I live right there at town, and am in a position to observe the traffic that comes into town and goes out over this road, and there is twice as much goes out over this road than there is over any other road, and I think that about one-third of the business coming into and going out of the town goes over this road. Prior to the improvement, and during the winter season this particular piece of road was bad. It was bottom land and there was considerable stretches of clay, and in the winter time there was about a mile of it that was bad.

The witness on cross-examination, stated in substance:

I think it would help traffic of the Railroad, but I don't know anything about the running of the railroad. I no not know what effect it would have on the Railroad. It helps the people who live down there along the road, but so far as the Railroad is concerned, and so far as its revenues are concerned, I do not know as to whether it would effect or help it or not.

John O'Brien was recalled, and stated that it was about 415 miles from Van Buren to St. Louis over the Frisco, and about 650 odd miles from Van Buren to St. Louis over the Iron Mountain.

This was all the evidence introduced at the trial of this cause.

(Certificate of Judge to Bill of Exceptions.)

Now comes the plaintiff and tenders the foregoing as his bill of exceptions in this case, and asks that the same may be made a part of the record, which is accordingly done, this 3 day of May, 1917.

FRANK A. YOUMANS,
Judge.

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61 (Praecipe for Transcript.)

(Filed in U. S. District Court May 21, 1917.)

To the Clerk of the above Court:

You are hereby directed, in the preparation of the transcript of the record in the above cause, to omit therefrom the original and first amended complaint, and to insert in said record only, the second amended complaint filed herein, and also to insert therein the answer filed by the defendants to the first amended complaint, also answer to the second amended complaint; the second amended complaint includes all the allegations and statements of the original and first amended complaint.

Dated this the 15th day of May, 1917.

W. L. CURTIS
THOS. B. PRYOR

Receipt of copy of the above praecipe is acknowledged and service thereof waived, this 16 day of May, 1917.

C. A. STARBIRD.

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62 (Clerk's Certificate to Transcript.)

I, Wm. S. Wellshear, Clerk of the District Court of the United States for the Western District of Arkansas, certify the foregoing pages numbered 5 to 61 inclusive, to be and constitute a true and correct copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case of Benjamin F. Bush, Receiver for St. Louis, Iron Mountain & Southern Railway Company vs. J. H. Branson, Sheriff and Ex-officio Tax Collector of Crawford County, Arkansas, et al, No. 259 in Equity, as the same appear on file and of record in my said office in the Fort Smith Division of said District.

I further certify this transcript to be in return of the appeal allowed to the plaintiff, Benjamin F. Bush, Receiver for St. Louis, Iron Mountain & Southern Railway Company, in said cause, to the United States Circuit Court of Appeals for the Eighth Circuit; and that citation with acceptance of

service is returned herewith together with copy of petition for and order enlarging time for filing the record herein on appeal.

Seal
Of the District Court
Western District
of Arkansas
U. S. A.

In Testimony Whereof, I hereunto set my hand and affix the seal of said court at office in the City of Fort Smith, Arkansas, this May 26, 1917.

WM. S. WELLSHEAR,
Clerk.

Filed May 31 1917 E. E. Koch, Clerk.

And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

(*Appearance of Mr. Thomas B. Pryor as Counsel for Appellant.*)

United States Circuit Court of Appeals, Eighth Circuit.

No. 4958.

B. F. BUSH, Receiver, etc., Appellant,

vs.

J. H. BRANSON, Sheriff & Collector of Crawford County, et al.

The Clerk will enter my appearance as Counsel for the Appellant.

THOS. B. PRYOR,
Fort Smith, Ark.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jun- 4, 1917.

(*Appearance of Messrs. Rose, Hemingway, Cantrell & Loughborough as Counsel for Appellees.*)

The Clerk will enter my appearance as Counsel for the Appellees.

W. E. HEMINGWAY.
G. B. ROSE.
D. H. CANTRELL.
J. F. LOUGHBOROUGH.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Aug. 30, 1917.

(*Appearance of Mr. C. A. Starbird as Counsel for Appellees.*)

The Clerk will enter my appearance as Counsel for the Appellees.

C. A. STARBIRD.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Sep. 1, 1917.

(*Appearance of Mr. W. L. Curtis as Counsel for Appellant.*)

The Clerk will enter my appearance as Counsel for the Appellant.

W. L. CURTIS.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Dec. 17, 1917.

(*Order of Submission.*)

December Term, 1917.

MONDAY, December 17, 1917.

This cause having been called for hearing in its regular order, Judge Youmans retires and takes no part in the hearing or determination of this cause, whereupon argument is commenced by Mr. W. L. Curtis for appellant, continued by Mr. C. A. Starbird and Mr. G. B. Rose for appellees and concluded by Mr. Thomas B. Pryor for appellant.

Thereupon, this cause is submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein, to be submitted to a third Judge if deemed advisable by the Court.

(*Opinion.*)

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1917.

No. 4958.

B. F. BUSH, Receiver, etc., Appellant,

vs.

J. H. BRANSON, Sheriff and Collector, etc., et al., Appellees.

Appeal from the District Court of the United States for the Western District of Arkansas.

Mr. W. L. Curtis and Mr. Thomas B. Pryor, for appellant.

Mr. C. A. Starbird and Mr. George B. Rose (with whom Mr. W. E. Hemingway, Mr. D. H. Cantrell, Mr. J. F. Loughborough and Mr. V. M. Miles were on the brief), for appellees.

Before Sanborn, Circuit Judge, and Trieber, District Judge.

TRIEBER, *District Judge,* delivered the opinion of the court.

The issue involved is the liability of the appellant, the receiver of the St. Louis, Iron Mountain & Southern Ry. Co., duly appointed in a proceeding to foreclose a mortgage executed by the Railway Company, for assessments on the railroad property, for the construction of a road by a Road District, created by a Special Act of the General Assembly of the State of Arkansas, approved April 28, 1911, Act 228, Session Acts of Arkansas, page 642.

The legality of the assessment is attacked upon several grounds. 1. That under the provisions of the Act, Sec. 5, the railroad's property was assessed on its three and six-tenths miles within the district for a sum equal to 28% of the entire cost of the road. 2. That the

assessment not only included the realty of the railroad, but also its rolling-stock and materials, which under the constitution and laws of the State of Arkansas are personalty, amounting to $6,770.00, the tax thereon being $44.59 annually for the term of twenty years; that the latter is in violation of Sec. 11 Art. 17 of the Constitution of the State and Sec. 5 of this Act, and also in violation of the equal protection clause of the Fourteenth Amendment, no other person's or corporation's personal property being so assessed. 3. That Section 5 of the Act provides that the county assessment is adopted, as conclusively determining the benefits from the construction of the road, and that under the laws of the State the property of the railroads is not assessed by county assessors, but by the State Tax Commission. 4. That the State Tax Commission is required by the laws of the State to include in the assessment of the Railroad property the value of its franchise, in addition to its tangible property, and therefore places a greater burden on the railroad than on other property, in violation of the Constitution of the State and the Fourteenth Amendment. 5. That the Act was enacted without notice or investigation, and arbitrarily fixed the charge, in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States. 6. That the assessment is void because based on the mileage basis of defendant's property, whereas all other property is on the acreage basis. 7. It is also claimed that the tax is void so far as it taxes the property of the railroad, because it is in no wise benefited by the building of the road. 8. That the Act creating the district is in violation of the constitutional provision of the State of Arkansas, Sec. 26, Art. 5, this being a special Act, and no notice thereof was published as required by that constitutional provision.

So far as provisions of the State Constitution are affected, their construction by the Supreme Court of the State is conclusive on the National Courts. This disposes of the assignment of error about local and special bills, notice of which had not been published, as it is the settled law of the state that the legislature is the sole judge, whether this provision has been complied with, and if it chose to disregard it and passed a bill without notice having been published, no issue upon the subject can be raised in the courts. Davies v. Gaines, 48 Ark. 370, 385; Waterman v. Hawkins, 75 Ark. 120; Caton v. Drainage Dist., 87 Ark. 8. This also applies to the contention that the property of the railroad cannot be assessed for benefits derived from an improvement district under the Constitution of the State. That it may be, was decided in St. Louis & San Francisco R. R. Co. v. Bridge District, 113 Ark. 493.

Does the assessment of the property of the railroad tax it equally with other property in the district, as required by Sec. 5 of Art. 16 of the Constitution of the State and the Fourteenth Amendment?

That this provision of the constitution applies to improvement districts was determined in Davies v. Gaines, supra. The claim that Sec. 5 of the Act, which makes the county assessment of the property within the district including railroads, the benefit to the property is void, because the property of the railroad is assessed by the State Taxing Board, and not by the county assessor, is untenable, for the State Tax Commission, after making the assessment certifies it

to each county, and thereupon it is put upon the assessment books, and thereafter becomes the assessment of the county in the same manner as if made by the county assessor. The Act does not say "the assessment made by the county assessor," but uses the words "county assessment."

But the assessment of the railroad property by the State Tax Commission differs materially from that made by the county assessors, as it includes not only the value of all the tangible property of the railroad company, but also the intangible property, called the franchise, thereby imposing on it a higher rate of taxation than on all other property of the district, which is clearly in violation of Sec. 5, Art. 16 of the Constitution of the State, Ft. Smith etc. Bridge Co., Ex parte, 62 Ark. 461, Bank of Jonesboro v. Hampton, 92 Ark. 492, State ex rel. v. Meek, 127 Ark. 349, and the equal protection clause of the Fourteenth Amendment.

The power of the legislature of a State to charge the cost of local improvements, either according to valuation or superficial area, or frontage cannot be questioned. Webster v. Fargo, 181 U. S. 394; St. Louis Southwestern R. R. v. Board of Directors, 81 Ark. 562; Board of Directors v. Crawford County Bank, 108 Ark. 421; Board of Improvement v. S. W. Gas & Electric Co., 121 Ark. 105.

The Act of the General Assembly, which declared the benefits to the property by the building of the road to be more than the cost thereof, as shown by the county assessment of each piece of property within the district, it is claimed is not due process of law, and therefore void. It is charged in the complaint that the Act was passed without any hearing or notice being given, giving the property owners an opportunity to be heard before the enactment of the law. This is not denied, nor is there any provision in the Act giving the tax-payer an opportunity to be heard on the assessment of the benefits, or appeal to any court, or other tribunal. That a State may by statute directly, or by appropriate legal proceeding fix the basis of taxation, or assessment without violating the due process provision of the National Constitution, unless it is palpably arbitrary, and a plain abuse, is beyond question. The latest cases on this subject are Wagner v. Baltimore, 239 U. S. 215; Houck v. Little River Drainage Dist., 239 U. S. 254, 262; Myles Salt Co. v. Board of Commissioners, 239 U. S. 478. But such power arbitrarily exercised, imposing a burden without a compensating advantage of any kind amounts to confiscation, and violates the due process provision of the Fourteenth Amendment. Myles Salt Co. v. Board of Commissioners, supra. In Gast v. Schneider Granite Co., 240 U. S. 55, a law establishing a paving district, levying the cost of paving on property fronting on the street, based on area without providing for equal depth of the assessment district was held to be void, reversing the decision of the Supreme Court of the State of Missouri. In Myles Salt Co. case, the court, in reversing the decision of the Supreme Court of Louisiana, said: "It is to be remembered that a drainage district has the special purpose of the improvement of particular property and when it is so formed to include property which is not and cannot be benefited directly or indirectly, including it only that it may pay for the benefit to other property, there is an abuse of power and an act of con-

fication. Wagner v. Baltimore, ante, p. 207. We are not dealing with motives alone but as well with their resultant action; we are not dealing with disputable grounds of discretion or disputable degrees of benefit, but with an exercise of power determined by considerations not of the improvement of plaintiff's property but solely of the improvement of the property of others—power, therefore, arbitrarily exerted, imposing a burden without a compensating advantage of any kind." And when assessments are thus imposed without the opportunity of having them reviewed by some authority, a court of equity may unquestionably interpose its protective arm to prevent wrong and injustice.

The pleadings and evidence establish the following undisputed facts: That in the assessment of benefits of the complainant there was included rolling stock and material of the value of $6,370.00. As this is clearly personalty under the laws of the State, Sec. 11, Art. 17 of the Constitution of Arkansas, it was not subject to assessment under the Act, which expressly limits the assessments to real property.

The contemplated road begins at the opposite end of the town of Alma from where the railroad tracks and station are, one quarter of a mile from them, and no portion of the road connects with the railroad's right of way. In addition to this, between one-eighth and one-quarter of a mile of the road, is outside the limits of the district.

The undisputed facts also show that all the realty in the district, except that of the plaintiff, is assessed on the acreage basis. If the property of the railroad company had been assessed on the acreage basis, as the other realty was, there are 7,700 acres in the district, its assessment would have been on fifty-three acres, and the taxes to be paid by the railroad would have been .0071 per cent of the entire assessment, instead of being 28%. Whether this is fatal, need not, in view of the conclusions reached on other issues, be determined herein. As to the benefits to be derived by the plaintiff railroad, the testimony of Mr. White, the Engineer of Maintenance of Way of the Railroad Company, of Mr. Brown, who is in charge of the engineering department of that division of the plaintiff, of Mr. Morse, the Superintendent of the plaintiff's road, and of Mr. Warden, the assistant engineer of the road, is to the effect that after a careful examination of this road, and being familiar with that section of the State and the conditions, the construction of this road will, in no wise, benefit the railroad, enhance its value in any way, or any portion thereof, or facilitate its operation, or add to its traffic, and that the distance from the place of connection with the other road is four and a half miles further to Van Buren than to Alma.

On the part of the defendants Dr. Crigler testified that he has for years resided at Alma, and is acquainted with this road, that in wet times it was, before the improvement was made, practically impassable; that the greater per cent of the people adjacent to the town of Alma used the road in coming to and going from Alma; that before the construction of this road many of them went to the town of Van Buren, during the wet season, to do their trading, while in good weather they would come to Alma; that in 1914 a large gas belt was discovered near there, and perhaps some of the gas-pipes used in the

gas field were shipped over the plaintiff's road, and unloaded at Alma, and carried over this new road. He also states that all the produce brought over this road to Alma is shipped out over plaintiff's railroad, and for this reason it is his opinion that the railroad is benefited by the road. On cross-examination he testified that the construction of the road was begun in 1915.

Mr. Cravens testified that he is a merchant residing at Alma, buys and sells farm produce, and is one of the commissioners of the road district; that he is familiar with the roads in and out of town, and while there are fair roads in and out of the town, this improvement district road carries fifty to sixty per cent of the traffic; that the old road before the improvement was made, was a fairly good road except in wet weather, and sometimes it was impossible to get through. It intersects with the road from Van Buren to Yoestown, three and a half miles south of Alma. He believes that fifty per cent of the produce coming in to merchants, and going out of the town of Alma comes over this road, and the building of the road increased the tonnage of the railroad. He doesn't know the amount of the tonnage, or the amount of stuff that goes out of Alma, but that practically all farm produce brought into Alma over this new road is shipped out over the Iron Mountain Railroad. On cross-examination he says that he is unable to say whether or not the revenues of the railroad will be increased by the improvement of the road. His impression is that they would be, but he doesn't know; if the country served by this road had no way of getting to Alma, they would take their produce to Van Buren, but he couldn't say whether that would affect the revenues of the road, but thought that it would make a difference, as Van Buren has a competing railroad, the St. Louis & San Francisco Railroad.

Mr. Hamer, who is a farmer, and knows this road, testified that it is now a good road; that he lives right out of town and is in a position to observe the traffic that comes into town over this road, and that twice as much comes over it now than did before it was improved; prior to the improvement and during the winter season that road was very bad. On cross-examination he says he thinks it helped the traffic of the railroad, but "I don't know anything about the running of a railroad; don't know what effect it would have on the railroad; it helps the people who live down there along the road, but so far as the railroad is concerned, and so far as its revenues are concerned, I do not know as to whether it would effect or help it or not."

That was all the evidence that was introduced on this subject. The maps of the road showing the territory embraced in the district and location of the road, and the plaintiff's property in relation to the road were also introduced by plaintiff.

Does the evidence show any benefit to the railroad, which justifies the assessment on its property? That the railroad may be assessed for road, bridge and other improvements, when benefited thereby may be conceded, and it has been so held by the Supreme Court of Arkansas in several cases. But if there is no advantage or benefit to its property, it clearly amounts to confiscation.

The only benefit to appellant claimed by appellees is that if this road had not been built, a great deal of the business, now coming to

Alma by reason of the construction of the road, would go to Van Buren, and there being a competitive road at Van Buren, the St. Louis & San Francisco Railroad, the plaintiff's road would only get a share of the business, while at Alma it gets it all, there being no competitive road there.

Although counsel in their briefs and argument indicate that the court rested its finding on the fact that the finding of benefits by the General Assembly is conclusive, even if the court erred in this declaration of law, if the assessment is warranted by reason of benefits to be derived by the railroad from it, this court would not reverse the cause upon the ground that the court gave a wrong reason for a correct conclusion. Latting v. Owasso Mfg. Co., 148 Fed. 369, 78 C. C. A. 183; Bunday v. Huntington, 224 Fed. 847, 140 C. C. A. 415. To declare the law, that the finding of benefits by the legislature, without any opportunity to the parties in interest to be heard, is conclusive, would enable a State under the guise of the taxing power to confiscate property. It has been well said, that the power to tax, is the power to destroy. McCulloch v. Maryland, 4 Wh. 431; Loan Association v. Topeka, 20 Wall. 655, 663. But assuming that the trial court found that the proof established a benefit to the Railroad, is the finding warranted by the evidence?

The finding of a trial judge is entitled to high consideration, and unless clearly against the weight of the evidence, or caused by a misapplication of the law, will not be disturbed on appeal. On the other hand if the finding is clearly against the weight of the evidence, the appellate court, in a proceeding in equity, will reverse it, as on appeal the facts as well as the law are open for consideration. Alexander v. Redmond, 180 Fed. 92, 103 C. C. A. 446.

The evidence hereinbefore set out convinces that the finding that the railroad would be benefited by this road is clearly against the weight of the evidence, if not entirely without any evidence to support it.

On the one hand, witnesses of experience in railroad traffic testified that it would be of no benefit to the railroad, or any part of it.

On the other hand none of the witnesses introduced by the defendant had any experience whatever in the management of railroads or their traffic, and merely expressed the opinion that if the town of Alma increased its trade, this railroad being the only one in that town, would be the beneficiary, and its traffic would be correspondingly increased, while without the improved road considerable traffic would be diverted to Van Buren where there was a competitive railroad. This cannot be said to be convincing testimony in view of the lack of experience of the witnesses introduced by the plaintiff. Judging from Mr. Hamer's testimony, the effect of the construction of the road is to "help the people, who live down there along the road".

Counsel rely on what was decided in St. Louis & San Francisco R. R. v. Bridge District, 113 Ark. 493, 495. The report of that case fails to show what the evidence was, but the court expressly held that the Act of the Legislature did not undertake to determine the amount of the benefits by the Act creating that bridge district. Nor did the court pass on the sufficiency of the evidence on the question of benefits. The court held on that point: "We are of the opinion that the

evidence is sufficient to sustain the finding of the circuit court as to the extent and value of the benefits. The testimony is conflicting and consists mainly of the opinions of witnesses who qualified themselves by showing that they had knowledge of the values of property in the district and the estimated benefits to accrue from the construction of the improvement. Anything like an extensive analysis of the testimony would serve no useful purpose," and concludes by saying: "We are not prepared to say that the evidence in this case, as it appears in the record, preponderates in favor of the amount of benefits found by the assessors and by the circuit court; but we are not called upon to pass upon the weight of the evidence. The question of its legal sufficiency is all that we need pass upon, and we are of the opinion that there is competent testimony of a substantial nature sufficient to base the finding upon as to the amount of benefits fixed." It is to be noted that that case was an action at law, and the findings of facts by the trial judge, sitting as a jury have much greater weight in the appellate court, than in a cause in equity.

It is also claimed by appellees that the plaintiff is estopped by his conduct to question the validity of the Act. They say in their brief: "The Railroad stood by, permitted the district to issue its negotiable bonds and to borrow the money with which to do the work, and permitted the work to be done; and then, when the highway was completed, and it was assured of an increased traffic that would result therefrom, it brought this suit to restrain the collection of taxes. * * * Without the tax upon the railroad, a large part of the bonds must go unpaid."

It may be conceded that the principle of estoppel can apply to cases of this nature, but in order to create an estoppel it is necessary that the party sought to be estopped, by his conduct induced the other party to act on it to his detriment, or, as said in Bloomfield v. Charter Oak Bank, 121 U. S. 121, 135, "No estoppel in pais can be created except by conduct which the person setting up the estoppel has the right to rely upon, and does in fact rely and act upon."

The only testimony on that point is that of Mr. Pryor, who testified, "I made an investigation of this (that is prior to the latter part of 1914 or the early part of 1915), I cannot remember how long before this. I remember that Judge Hill represented the contractors, and we discussed the feasibility of building the road under the Act creating Crawford County Road Improvement District Number 2, of the Acts of 1911. Judge Hill stated to me that he did not believe that the Commissioners would be able to get the contractors, whom he represented, to take the contract and look to the bonds to be issued for payment of the cost of the construction of the road; that the Commissioners were making an effort to do so, but that he had advised his clients, the contractors, against the proposition. We discussed the matter several times, and he suggested that he would keep me advised as the matter progressed. I had no further information from him, and knew nothing at the time of the contract being let or of any effort on the part of the Commissioners to obtain a contract on any other terms for the building of the road. The next information I had in regard to it was that the bonds had been sold, and that considerable work had been done on the road."

This clearly does not establish an estoppel, especially as to the contractors and purchasers of the bonds, who were not parties to the formation of the district, or the assessment of benefits, nor parties to this action. Deery v. Cray, 5 Wall. 795; Thompson v. Sioux Falls Natl. Bank, 150 U. S. 231, 244. Nor was the plaintiff, or the Railroad Company, a party to any of the Board's proceedings. For more than three years after the enactment of the Act, nothing was done towards the construction of the road. This action was instituted on March 17, 1916, and while the record fails to show when the assessments were certified by the Board to the collector of taxes, it must have been done on January 1, 1916, as the bill only seeks to enjoin that year's taxes, and under the provision of the Act the taxes were to be certified by the board on or before January 1, of each year, and become payable between the first Monday in January and the 10th day of April of that year.

It therefore cannot be said that plaintiff did not act promptly. The decree is reversed upon two grounds: 1. That the Act imposes a higher rate of taxation on the Railroad property of the plaintiff, than it does on the other property in the district, by reason of the fact that its franchise and other intangible property is included in its assessment. 2. Upon the ground that the evidence fails to show that the Railroad Company derives any benefit from the road.

The decree of the lower court is reversed with directions to make the temporary injunction perpetual.

Filed February 16, 1918.

(*Decree.*)

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1917.

SATURDAY, February 16, 1918.

No. 4958.

B. F. BUSH, Receiver of the Property of St. Louis, Iron Mountain and Southern Railway Company, Appellant,

vs.

J. H. BRANSON, Sheriff and Collector of Crawford County, and J. J. Cravens, W. B. Smith, and R. F. Hamer, Commissioners of Road Improvement District No. 2, Crawford County, Arkansas.

Appeal from the District Court of the United States for the Western District of Arkansas.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Arkansas, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in

this cause, be, and the same is hereby, reversed with costs; and that B. F. Bush, Receiver of the property of St. Louis, Iron Mountain and Southern Railway Company, have and recover against J. H. Branson, Sheriff and Collector of Crawford County, and J. J. Cravens, W. B. Smith and R. F. Hamer, Commissioners of Road Improvement District No. 2, Crawford County, Arkansas, the sum of — Dollars for his costs in this behalf expended and have execution therefor.

It is further ordered that this cause be, and the same is hereby, remanded to the said District Court with directions to make the temporary injunction perpetual.

February 16, 1918.

(Prayer for Appeal to Supreme Court U. S., and Order Allowing Same.)

United States Circuit Court of Appeals for the Eighth Judicial Circuit.

J. H. BRANSON, Sheriff and Ex-officio Tax Collector of Crawford County, Arkansas, and J. J. Cravens, W. B. Smith, and R. F. Hamer, Commissioners of Crawford County Road Improvement District Number 2, and Crawford County Road Improvement District Number 2, Appellants,

vs.

BENJAMIN F. BUSH, as Receiver for the St. Louis, Iron Mountain & Southern Railway Company, Appellee.

The above mentioned J. H. Branson, as Sheriff and Ex-officio Tax Collector of Crawford County, Arkansas, and J. J. Cravens, W. B. Smith and R. F. Hamer, as Commissioners of Crawford County Road Improvement District Number Two, and said Crawford County Road Improvement District Number Two respectfully show that a judgment was rendered on the 16th day of February, 1918, in the above entitled cause by the above Court, affirming the decree of the District Court of the United States for the Fort Smith Division of the Western District of Arkansas; that the matter in dispute exceeds One Thousand Dollars ($1,000.00) besides costs, and that the cause is one involving the question whether a statute of the State of Arkansas is in conflict with the Constitution of the United States, and therefore proper to be reviewed by the Supreme Court of the United States on appeal.

The said J. H. Branson, as such Collector, the said Cravens, Smith and Hamer, as such Commissioners, and the said Road Improvement District therefore pray that an appeal be allowed them in the above entitled cause, directing the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in

the assignment of errors herewith filed may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

C. A. STARBIRD,
W. E. HEMINGWAY,
G. B. ROSE,
D. H. CANTRELL,
J. F. LOUGHBOROUGH,
Attorneys for Appellants.

On this 14th day of March, A. D. 1918, it is ordered that the foregoing appeal be allowed as prayed and that the amount of the bond for costs on appeal be fixed at the sum of $500. the same to operate as a bond for costs only and to be filed within ten days from this date as a condition precedent to the allowance of the appeal.

WALTER H. SANBORN,
Senior United States Circuit Judge
for the Eighth Circuit.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Mar. 14, 1918.

(*Assignment of Errors on Appeal to Supreme Court U. S.*)

The appellants in the above entitled cause, in connection with their petition for appeal herein, present and file herewith their assignment of errors as to which matters and things they say that the decree entered herein is erroneous, to wit:

First. The Circuit Court of Appeals for the Eighth Judicial Circuit erred in holding that Act 228, of the session of the General Assembly of the State of Arkansas of the year 1911, approved April 28, 1911, entitled "An Act to create Crawford County Road Improvement District Number Two", in its application to the said St. Louis, Iron Mountain & Southern Railway Company, or to the Receiver thereof, is in conflict with the Fourteenth Amendment to the Constitution of the United States

Second. The Circuit Court of Appeals for the Eighth Judicial Circuit erred in holding that said Act imposes a higher rate of taxation on the railroad property of the plaintiff than it does on other property in the district, by reason of the fact that its franchise and other intangible property is included in its assessment.

Third. The Circuit Court of Appeals for the Eighth Judicial Circuit erred in holding that the evidence in this cause fails to show that the Railway Company derives any benefit from the building of the road constructed by the appellant road district.

Wherefore, the appellants pray that said judgment and decree of the said Circuit Court of Appeals for the Eighth Judicial Circuit be

reversed, and that the appellants may have an adjudication and decree in their favor as herein specified.

C. A. STARBIRD,
W. E. HEMINGWAY,
G. B. ROSE,
D. H. CANTRELL,
J. F. LOUGHBOROUGH,
Attorneys for Appellants.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Mar. 14, 1918.

(*Bond on Appeal to Supreme Court U. S.*)

Know all men by these presents: That we, J. H. Branson, Sheriff and Ex-officio Tax Collector of Crawford County, Arkansas, and J. J. Cravens, W. B. Smith and R. F. Hamer, Commissioners of Crawford County Road Improvement District Number 2, and Crawford County Road Improvement District Number 2, of the County of Crawford and State of Arkansas, as principals, and the undersigned sureties are held firmly bound unto B. F. Bush, as Receiver of the property of the St. Louis, Iron Mountain and Southern Railway Company, his successors and assigns, in the sum of Five Hundred Dollars ($500.00), to be paid to the said Bush as such Receiver, and to his successors or assigns; we bind ourselves, and each of our heirs, executors or administrators jointly, separately and firmly by these presents. Sealed with our seals and dated the 15th day of March, 1918.

Whereas, the appellants in the above entitled suit have prosecuted an appeal to the Supreme Court of the United States, to reverse the decree rendered and entered in said cause in the Circuit Court of Appeals for the Eighth Circuit on the 16th day of February, 1918;

Now, Therefore, the condition of this obligation is such that if the said appellants shall prosecute the said appeal to effect and answer all costs if they fail to make said appeal good, then this obligation shall be void; otherwise to remain in full force and virtue.

J. H. BRANSON,
Sheriff and Ex-officio Tax Collector of Crawford County, Arkansas, and J. J. Cravens, W. B. Smith, and R. F. Hamer, Commissioners of Crawford County Road District Number 2, and Crawford County Road Improvement District Number 2,
By C. A. STARBIRD AND
ROSE, HEMINGWAY, CANTRELL, LOUGHBOROUGH & MILES,
Attorneys.

A. O. WILSON,
JOHN J. TAUSSIG,
Sureties.

STATE OF MISSOURI,
City of St. Louis:

We, the undersigned sureties named in the foregoing bond, being first duly sworn, each for himself says:

That he is a resident and freeholder in the City of St. Louis and State of Missouri, and is worth the sum of One Thousand Dollars ($1,000.00) over and above all his just debts and liabilities, exclusive of exempted property.

A. O. WILSON.
JOHN J. TAUSSIG.

Subscribed and sworn to before me, this 29th day of March, 1918.

[SEAL.]

FRANK M. COX,
Notary Public for the City of St. Louis and State of Missouri.

My commission expires August 10, 1920.

Approved: March 30, 1918.

WALTER H. SANBORN,
Senior U. S. Circuit Judge for the Eighth Circuit.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Mar. 30, 1918.

Citation.

UNITED STATES OF AMERICA, *ss:*

To B. F. Bush, Receiver of the property of St. Louis, Iron Mountain and Southern Railway Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, D. C., within thirty days from and after the date hereof, pursuant to an order allowing an appeal, filed in the Clerk's office of the United States Circuit Court of Appeals for the Eighth Circuit, wherein J. H. Branson, Sheriff and Collector of Crawford County, and J. J. Cravens, W. B. Smith and R. F. Hamer, Commissioners of Road Improvement District No. 2, Crawford County, Arkansas, are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants as in said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Walter H. Sanborn, Senior United States Circuit Judge in and for the Eighth Circuit, this 14th day of March, A. D. 1918.

WALTER H. SANBORN,
Senior United States Circuit Judge for the Eighth Circuit.

Marshal's Return.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern
Judicial District of Missouri, ss:

I do hereby certify that in the City of St. Louis, State of Missouri, in the Eastern Division of the Eastern Judicial District of Missouri, on the 22nd day of March, 1918, I executed the within writ by delivering a true and correct copy thereof to the within named B. F. Bush, Receiver of the property of the St. Louis, Iron Mountain and Southern Railway Co.

Marshal's Fees, $2.06.

JOHN E. LYNCH,
U. S. Marshal,
By F. W. KLEIN,
Deputy.

[Endorsed:] U. S. Circuit Court of Appeals, Eighth Circuit, December Term, 1917. No. 4958. B. F. Bush, Receiver, etc., Appellant, vs. J. H. Branson, Sheriff, etc., et al. Citation on Appeal to Supreme Court, U. S. Filed Mar. 27, 1918. E. E. Koch, Clerk. #3233.

(*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Western District of Arkansas as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein B. F. Bush, Receiver of the Property of St. Louis, Iron Mountain & Southern Railway Company, was Appellant, and J. H. Branson, Sheriff and Collector, etc., et al., were Appellees, No. 4958, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with Marshal's return of service endorsed thereon is hereto attached and herewith returned.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth

Circuit, at office in the City of St. Louis, Missouri, this first day of April, A. D. 1918.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 26,434. U. S. Circuit Court of Appeals, 8th Circuit. Term No. 967. J. H. Branson, Sheriff and Collector of Crawford County, and J. J. Cravens, W. B. Smith, and R. F. Hamer, Commissioners of Road Improvement District No. 2, Crawford County, Arkansas, appellants, vs. B. F. Bush, Receiver of the property of St. Louis, Iron Mountain & Southern Railway Company. Filed April 13th, 1918. File No. 26,434.

IN THE

Supreme Court of the United States

J. H. BRANSON, SHERIFF AND COLLECTOR OF CRAWFORD COUNTY, AND J. J. CRAVENS, W. B. SMITH AND R. F. HAMER, COMMISSIONERS OF ROAD IMPROVEMENT DISTRICT NO. 2 OF CRAWFORD COUNTY, ARKANSAS ..... *Appellants.*

v. No. 967.

B. F. BUSH, RECEIVER OF THE PROPERTY OF THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY ..... *Appellee.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLANTS.

STATEMENT OF FACTS.

The St. Louis, Iron Mountain & Southern Railway Company runs from Fort Smith on the Arkansas river

at the western boundary of the State of Arkansas in an easterly and southeasterly direction to Little Rock, and thence to St. Louis, passing through the town of Van Buren, six miles east of Fort Smith, and through the town of Alma, eleven miles east of Van Buren. The most productive territory in the vicinity of Alma is found in the Arkansas river bottoms, which are of great fertility. A high road runs from Van Buren to Little Rock, passing through these bottoms at a distance of three and one-half miles south of Alma. This highway was connected with Alma, which is a considerable town, by a road which, throughout a large season of the year, was impassable. Nevertheless, from fifty to sixty per cent of the traffic to Alma passed over this road, and all goods shipped to Alma are hauled over the Iron Mountain railroad, and all goods reaching that town are shipped out over it. Until, however, the road of the appellant was built, the traffic, through a large season of the year when this road was practically impassable, went to Van Buren, where the line of the St. Louis & San Francisco railroad crosses the Iron Mountain railroad. St. Louis is the business center for all this region. Thither most of its products are shipped, and from there must of its goods are imported. The distance from Van Buren to St. Louis over the St. Louis & San Francisco railroad is four hundred and fifteen miles, while the distance from Van

Buren to St. Louis over the Iron Mountain railroad is six hundred and fifty miles (Tr. 42); so that it may be assumed as a certainty that if goods were carried to Van Buren on wagons the majority of them would be shipped over the St. Louis & San Francisco railroad rather than over the Iron Mountain.

In 1911, the General Assembly of the State of Arkansas passed Act No. 228, organizing Crawford County Road Improvement District No. 2 for the purpose of improving the road leading from Alma south to a connection with the highway running from Van Buren to Little Rock. The material portions of this act are set out on pages 7, 8 and 9 of the transcript. The appellee, who is the receiver in charge of said railroad, attacks the fifth section of the act on the ground that it is in contravention of the Fourteenth Amendment. This section is as follows (Tr. 8):

"Section 5. It is ascertained and hereby declared that all real property within said district, including railroads and tram roads, will be benefited by the building of the said highway more than the cost thereof as apportioned in the county assessment of each piece of property within the district, for this and the succeeding years, and the cost thereof is made a charge upon such real property superior to all other mortgages and liens except the liens for the ordinary taxes, and for improvement districts heretofore organized; and the

said commissioners are authorized and directed each year to levy upon said land an amount sufficient to pay the necessary expenses of the district for that year, and all interest and principal of bonds maturing, and all installments of the sinking fund, if any such there be, which assessment is to be collected from the owners of real property, railroads and tram roads in the manner hereinafter provided, and in proportion to their respective assessments as shown by the then last county assessment."

This contention was sustained by the Circuit Court of Appeals; hence this appeal.

ASSIGNMENT OF ERRORS (TR. 55).

"First. The Circuit Court of Appeals for the Eighth Judicial Circuit erred in holding that Act 228, of the General Assembly of the State of Arkansas of the year 1911, approved April 28, 1911, entitled, 'An Act to Create Crawford County Road Improvement District No. 2,' in its application to the said St. Louis, Iron Mountain & Southern Railway Company, or to the receiver thereof, is in conflict with the Fourteenth Amendment to the Constitution of the United States.

"Second. The Circuit Court of Appeals for the Eighth Judicial Circuit erred in holding that said act imposes a higher rate of taxation on the railroad property of the plaintiff than it does on other property in

the district, by reason of the fact that its franchise and other intangible property is included in its assessment.

"Third. The Circuit Court of Appeals for the Eighth Judicial Circuit erred in holding that the evidence in this cause fails to show that the railway company derives any benefit from the building of the road constructed by the appellant road district."

ARGUMENT.

HIGHWAYS AN IMPROVEMENT JUSTIFYING A LOCAL ASSESSMENT AGAINST A RAILROAD.

The only purpose of a railroad is to carry traffic. Its only income is derived from the passengers and freight it transports. Its value is proportioned to the amount of traffic that passes over its lines. Without adequate traffic it is worth only the price of its materials as scrap. Since the value of a railroad depends upon the amount of its traffic, it is a contradiction in terms to say that its value is not increased by a public improvement which augments its traffic.

This is an Arkansas case, and in matters of local improvements this court is loath to interfere with the public policy of the respective States. The cases in which that rule has been announced are so numerous

that it suffices to cite French v. Barber Asphalt Company, 181 U. S. 324.

The Arkansas Supreme Court has ruled that as the value of a railroad is dependent upon its traffic, it can be assessed to pay for a public improvement by which its traffic will be enlarged.

A bridge is only that part of a highway traversing a stream; and in St. Louis & San Francisco Railroad Company v. Fort Smith & Van Buren Bridge District, 113 Ark. 493, it was held that a railroad could be assessed to pay for a free bridge across the Arkansas river on the ground that "the estimated growth of population in the locality will reasonably be expected to increase the traffic."

In its opinion in this case (Tr. 49, 12th line from bottom), the Circuit Court of Appeals states that the witnesses for appellee testify that the building of the road will not increase the traffic of the railroad. In this it is mistaken. We have gone over the testimony with the greatest care, and affirm that there is no such evidence in the record. No traffic man was called to testify. The witnesses whose testimony is relied upon by the court below are all engineers, and speak only from an engineering standpoint. They can perceive no direct benefit to the railroad such as would accrue from a parallel highway that would facilitate repairs and con-

struction. Not one of them denies that an increase of traffic would result; nor could he do so without placing himself in conflict with the admitted facts.

As was said by the Supreme Court of Arkansas in Waters-Pierce Oil Company v. Knisel, 79 Ark. 624:

"The testimony of Arthur Harris can have no probative force when it is in direct conflict with the conceded or physical facts and to believe it would involve an absurdity in reason and common experience."

The court below says that no witness testifies that the railroad would be benefited by the improvement. We submit that such testimony would be a mere conclusion and an invasion by the witness of the province of the court, which must determine from the established facts whether a benefit would accrue.

Here there is no dispute about the facts. All goods brought to Alma must come in over appellee's road. All goods shipped from Alma must go out over its line. If goods are carried to Van Buren, the chances are that they will be shipped out over the St. Louis & San Francisco railroad, whose line to St. Louis is only 415 miles long as against the 650 miles of appellee's. This permits a more expeditious delivery of freight over the Frisco, as it is popularly called, and every one knows that quickness of delivery is usually a controlling factor in the choice of a carrier.

This highway diverts to Alma a great deal of traffic which otherwise would go to Van Buren, to be hauled by the Frisco. It induces people to ship to Alma many goods which otherwise would be consigned to Van Buren. By trading at Alma the people in the fertile Arkansas bottoms, where most of the wealth and population of that region are concentrated, are saved more than eight miles of hauling. A majority of the trade of Alma comes over this road. In bad weather it was impracticable, and the trade went to Van Buren, where the appellee must compete at a disadvantage with the shorter lines of the Frisco.

If there was ever a case for the application of the doctrine, *res ipsa loquitur*, it is this. Here is a large town, the greater part of whose traffic comes over this road. The road was impassable during a large part of the year, and not good at any time. It is now paved with macadam, and made an excellent highway. This highway saves the people tributary thereto more than eight miles of wagon hauling. The inevitable conclusion is that it will induce the shipment of freight from and to Alma, where the appellee has a monopoly of the traffic. The facts are clear and undisputed. It is for the court, not the witnesses, to draw the conclusion therefrom; and we submit that only one logical conclusion can be drawn.

In St. Louis & San Francisco Railroad v. Fort Smith & Van Buren Bridge District, 113 Ark. 493, it was held that the mere prospect of an increase of population in consequence of the building of the bridge would justify a local assessment against the railroad. The decision is unquestionably right; for the value of a railroad depends on the amount of its traffic, and the amount of the traffic is ordinarily proportioned to the density of population.

Good roads are essential to the development of any community, and it is common knowledge that population will continue sparse until good roads are built; and a sparse population can rarely furnish to a railroad the traffic essential to its prosperity. There is no reason to doubt that the building of this road will have its customary effect in inducing immigration. But in this instance there is more than that. Here there is a road which diverts to appellee's line traffic that otherwise would go to a rival. We submit that this is an obvious benefit, which the courts are not justified in ignoring.

The court below decided the case on the opinion of the witnesses called by the railroad.

If the opinion of witnesses is to be taken, it should be the opinion of experts. It is not shown that the witnesses called by the railroad knew anything about

its traffic. Three of them are engineers, the fourth a superintendent located at Wynne nearly two hundred and fifty miles from Alma. Not one of them professes to have any knowledge of the railroad's traffic. Yet the opinion of these men, who do not profess to know anything about the question involved, viz., What effect will the improvement of the highway have upon the traffic of the railroad?—who do not pretend to be experts in matters of traffic, and who, to do them justice, do not make the slightest reference to the question of traffic, is accepted by the court below as conclusive, though it is apparent that their evidence, if directed to the only issue in the case, the question of traffic, is at variance with the admitted facts.

LEGISLATIVE ASSESSMENT MUST STAND UNLESS DEMONSTRABLY WRONG.

The courts pay great respect to the legislative judgment in the assessment of benefits. The finding of the Legislature will not be set aside unless it is demonstrably wrong.

As was said in Union Transit Co. v. Kentucky, 199 U. S. 203:

"Even in case of special assessments imposed for the improvement of property within certain limits, the fact that it is *extremely doubtful whether a particular*

lot can receive any benefit from the improvements does not invalidate the tax with respect to such lot."

The same rule is firmly established in Arkansas.

Thus in Coffman v. St. Francis Drainage District, 83 Ark. 60, 61, the court said:

"Therefore the only question is whether the allegations of this complaint show that the act of the Legislature is such an arbitrary abuse of the taxing power as would amount to a confiscation of plaintiff's property *without any benefit whatsoever*, and thus bring the case within the doctrine of Norwood v. Baker, as explained in later cases."

And in Moore v. Directors of Long Prairie Levee District, 81 Ark. 562, the court held:

"Where there is evidence sufficient to sustain a finding that a railroad track was benefited by the building of a certain levee, a legislative determination that the railroad should be assessed for the purpose of building such levee is conclusive upon the courts, *whether the track was benefited as much as other property in the district or not.*"

So in Board of Improvement v. S. W. G. & E. Co., 121 Ark. 105, the court held:

"A legislative ascertainment that benefits from a local improvement accrue in proportion to the value of

the property affected, will be respected *unless it is demonstrated to a certainty* that a mistake has been made."

And in Fellows v. McHaney, 113 Ark. 364, the court held:

"Where a complaint attacking an assessment of benefits under a statute creating a drainage district, simply contends that an assessment validated by the Legislature is unequal and unjust, the allegations are not sufficient to authorize the court to review the legislative assessment."

Of course, if it can be shown to a certainty that particular property will be required to bear more than its share of the burden, this would be a violation of the Fourteenth Amendment.

Such cases are Myles Salt Co. v. Iberia Drainage District, 239 U. S. 478, and Gast v. Schneider Granite Co., 240 U. S. 55.

In the first of these an island 175 feet high was included in a drainage district formed to drain the low-lying adjacent mainland. It needed no drainage; could receive no benefit from the operations on the mainland, and it was included merely for the purpose of taxing the valuable salt mines thereon for the benefit of the neighboring proprietors.

In the latter case, three-fourths of the tax was levied upon the area within a line drawn half way between Broadway, the street to be improved, and the next adjoining street. In some cases this line was less than a hundred feet from Broadway, while through the property of the appellant it was more than five hundred feet away; so that upon the area basis the appellant's property was taxed five times as much as the adjacent property for the same benefit. But in that case the court took care to say (page 58):

"The Legislature may create taxing districts to meet the expense of local improvements and may fix the basis of taxation without encountering the Fourteenth Amendment unless its action is palpably arbitrary or a plain abuse."

These are the two cases relied upon by the court below to sustain its ruling, but we are unable to see their application to the case at bar. In those cases there was a shocking discrimination against the complainant. In this case the tax is levied *ad valorem* and equally upon all the real property in the district. Here the railroad complains that it will have to pay $450 per year for twenty years. In return it gets a large part of the traffic from a fertile and highly improved region. All the traffic of the considerable town of Alma goes over its line. A majority of that traffic comes over

this highway; and it is inconceivable that the railroad will not derive more than the pitiful sum of $450 per year from the traffic induced by the highway's improvement. The Legislature has found that it would do so, and there is no evidence to the contrary. Surely this court will not strike down an act of a State legislature upon a mere suspicion that it will do injustice, a suspicion wholly unsupported by proof.

ASSESSMENT MAY BE AD VALOREM.

It is the established rule of this court that taxes for local improvements may be based upon the assessment for county and State taxes. As was held in Webster v. Fargo, 181 U. S. 394:

"It is within the power of the Legislature of a State to create special taxing districts, and to charge the cost of local improvement, in whole or in part, upon the property in said districts, either *according to valuation,* or superficial area, or frontage; and it was not the intention of this court, in Norwood v. Baker, 172 U. S. 269, to hold otherwise."

In Houch v. Little River Dist., 239 U. S. 255, the court held:

"A State may, in its discretion, lay assessments for public work in proportion either to position, frontage, area, market *value* or estimated benefits; and, un-

less the exaction is a flagrant abuse of power, it does not amount to deprivation of property without due process of law."

The Supreme Court of Arkansas has repeatedly determined that an *ad valorem* assessment for local improvements is valid.

Thus in St. L. S. W. Ry. Co. v. Board of Directors of Red River Levee District No. 1, 81 Ark. 562, the court held:

"It is within the discretion of the Legislature to require that assessments for levee purposes should be made according to the whole value of the land in the levee district, or according to the value of the benefit added by the improvement.

"The act creating Red River Levee District No. 1 (Acts 1905, page 231, *et seq.*), is not unconstitutional in providing, in section 4, that a levee tax shall be assessed on the real estate in the district according to the valuation of lands on the tax books for State and county purposes."

To the same effect:

Board of Improvement v. S. W. G. & E. Co., 121 Ark. 105.

St. L. S. W. Ry. Co. v. Grayson, 72 Ark. 119.

Porter v. Waterman, 77 Ark. 384.

Board of Directors v. Crawford County Bank, 108 Ark. 421.

Moore v. Board of Directors of Long Prairie Levee District, 98 Ark. 116.

TAXATION OF FRANCHISE.

The court below made a ruling which, if sustained, will overturn the system of taxation for local improvements existing in every State in the Union, and be productive of more trouble than Pandora's fatal box.

In Arkansas, as in every other State, a railroad is taxed as a going concern, not as a mere lot of rails, crossties and rolling stock. This is the only just method of taxation. A railroad has no value as a thing of beauty. Its only value is in its capacity to earn money. Some very costly railroads are worth only what the rails will bring as scrap. Others, which cost far less, are exceedingly valuable because the traffic over them is great and largely remunerative. So, the only intelligent way to tax a railroad is to ascertain the worth of the property as a whole in view of the amount of its net earnings, and to distribute this value equitably over the system, so that the portion in each county or municipality may bear its just share of the public burdens. We have not made an investigation of the statutes in all

the States; but we feel safe in saying that this method of assessment is universal.

The court below says that this taxes the franchise of the corporation; that the franchise is personal property; that personal property can not be taxed for local improvements; and that consequently the law is void in so far as it attempts to tax the railroad.

If that be true, there can be no assessment of railroads for local improvements upon an *ad valorem* basis. It is not likely that there is any State where laws imposing *ad valorem* assessments do not exist. In most States, as in Arkansas, they are very numerous. And they are on the whole the fairest method of assessment. Where there is a special assessment of benefits we have only the guess of an individual or a board as to what the result of the improvement will probably be. Where the assessment is *ad valorem* we get the true value as augmented by the improvement. It is true that other elements beside the improvement may enter unto the creation of that value; but taxation is at best an approximation, and innumerable decisions of this court have settled that perfect equality, however desirable, is neither demanded nor expected.

As was said in Cass Farm Co. v. Detroit, 181 U. S. 396, 398:

"We have recently held that it was not the intention of the Fourteenth Amendment to subvert the systems of the States pertaining to general and special taxation; that the amendment legitimately operates to extend to the citizens and residents of the States the same protection against arbitrary State legislation affecting life, liberty and property, as is afforded by the Fifth Amendment against similar legislation by Congress, and that the Federal courts ought not to interfere when what is complained of is the enforcement of the settled laws of the States applicable to all persons in like circumstances and conditions, but only when there is some abuse of law, amounting to confiscation of property or deprivation of personal rights, as was instanced in the case of Norwood v. Baker. French v. Asphalt Paving Co., Tonawanda v. Lyon, Wight v. Davidson, *ante*, 324, 389, 371."

That rule has been repeated many times since, and has become elementary in the jurisprudence of this court.

The numerous decisions of the Supreme Court of Arkansas cited above in this brief sufficiently show that the taxation of railroads *ad valorem* to pay for local improvements has long been an approved method of local assessment in that State; and it is not the purpose of the Fourteenth Amendment to destroy that system,

nor is such a calamity justified by the decisions of this court.

The court below thinks that injustice has been done to the railroad because its property is valued for taxation as a going concern and not as dead capital, and it thinks that this is a tax not upon the property but upon the franchise. We submit that this is a mistake. The tax is upon the property; but in fixing the value of that property, its earning capacity is considered. The principle applied to the taxation of railroads is one that is equally applicable to every form of industrial enterprise. Suppose there were two sawmills in Alma, costing the same amount, but one of which had failed in business and was destined to be scrapped, while the other was a prosperous going concern; would not a higher assessment be placed upon the latter than upon the former? The last would sell for perhaps ten times as much as the first; and what property will sell for is the criterion of its taxable worth.

The decision of the Circuit Court of Appeals is revolutionary and without precedent. No similar ruling was ever made before so far as we are advised. Certainly no authorities are cited to sustain it. We believe such a contention was never before advanced; and we submit that a system of taxation for local improvements which is common in every State of the Union and which had been in general use from time im-

memorial ought not to be declared invalid unless it is demonstrable that it will infringe constitutional rights.

RAILROAD ESTOPPED.

The railroad was notified of the intention to build this highway by the passage of the act creating the district. It also had actual notice of the building of the highway, because the rock, gravel and other material used in its construction was hauled over the railway, and the work was carried on in open view, where the railway officials had full knowledge of its progress. Nevertheless, the railroad stood by, permitted the district to issue its negotiable bonds and to borrow the money with which to do the work, and permitted the work to be done; and then, when the highway was completed, and it was assured of the increased traffic that would result therefrom, it brought this suit to restrain the collection of taxes. To grant this prayer would be to give judicial sanction to a palpable fraud. Without the tax upon the railroad, a large part of the bonds must go unpaid.

That courts will not sanction such conduct is abundantly established by the authorities.

The two leading cases upon the subject are the Tulare Irrigation Co. v. Shepherd, 185 U. S. 1, and Shepard v. Barron, 194 U. S. 533.

In the first of these cases the syllabus is as follows:

"The Tulare Irrigation District, in California, issued and sold its bonds for the purpose of constructing its irrigation works. The proceeds were used for that purpose by the corporation, and the works were by means thereof constructed. The corporation then refused to pay the bonds, and denied its liability on them upon the ground that it was never legally organized as a corporation, and hence had no legal right to issue any bonds. Held, on the authority of Douglas County Commissioners v. Bolles, 94 U. S. 104, that common honesty demanded that a debt thus incurred should be paid; and that there was nothing in the facts in this case to set aside the application of that principle; that if anything could constitute a *de facto* corporation the defendant is one, and that, being thus a *de facto* corporation, none but the State can question its existence;

In the second case, the court held:

"Where a public improvement is completed, and the assessment made at the instance and on the petition of the owners of the property, and pursuant, in form at least, to an act of the Legislature of the State, and in strict compliance with its provisions and with the petition, there is an implied contract that the parties, at whose request and for whose benefit the work was

done, will pay for it in the manner provided for by the act; and after completion of the work they can not set up the unconstitutionality of the act to avoid the assessment.

"An assessment made under such circumstances does not deprive the owners of their property without due process of law, nor take their property without just compensation."

That an improvement district improperly organized may be a corporation *de facto* and capable of enforcing its lien for taxes when the work has been done, was also decided by the Supreme Court of Arkansas in Whipple v. Tuxworth, 81 Ark. 391.

The court below held that the railroad was not estopped because the attorney of the contractors (not the attorney of the district) told the attorney of the railroad that he did not think that the district would be able to get the contractors to accept the bonds of the district in payment for the work. It is not pretended that any one authorized to speak for the district did anything to mislead any one connected with the railroad. Neither the engineering department of the railroad nor its traffic department claims ignorance of the progress of the work. It was carried on in plain view of the railroad, where both could see it; and the numerous cars of gravel hauled in by the railroad to be

used in the construction of the highway brought the matter home to the traffic department in the most effective manner. It will hardly be contended that one of the duties of the law department of a railroad is to watch the building of highways; and even if such an astonishing proposition is maintained, we are at a loss to understand how the district could be prejudiced by statements made by the attorney of the contractors.

Respectfully,

W. E. Hemingway.
G. B. Rose.
D. H. Cantrell.
J. F. Loughborough.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

J. H. BRANSON, SHERIFF AND COLLECTOR OF CRAWFORD COUNTY, AND J. J. CRAVENS, W. B. SMITH AND R. F. HAMER, COMMISSIONERS OF ROAD IMPROVEMENT DISTRICT No. 2 OF CRAWFORD COUNTY, ARKANSAS.....*Appellants*,

v. No. 82.

B. F. BUSH, RECEIVER OF THE PROPERTY OF THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY.....*Appellee*.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLANTS IN REPLY.

HIGHWAY AN IMPROVEMENT JUSTIFYING A LOCAL ASSESSMENT AGAINST A RAILROAD.

Counsel speak as if it were an almost unheard of outrage to tax a railroad for the building of a highway.

Civilization can not exist without roads, and their construction is a necessary governmental expense. Ordinarily, the required funds are raised by direct taxation, which bears equally upon all classes of property, real and personal. Sometimes, as in this instance, the work is done by improvement districts, and the tax levied only upon the real estate. In this way the personal property escapes taxation. Instead of crying out against this district, the railroad should thank God fasting that its personal estate is not called upon to bear its ordinary proportion of the burden of building the road. In a great majority of States, direct taxation is the only method employed for road building; and, while the railroads, like every one else, may find the expense of constructing the necessary highways to be burdensome, nevertheless they are more fortunate in Arkansas than in most jurisdictions.

Since the original brief was filed in this case, the proposition that a railroad may be assessed for building a highway, and that its assessment may be based on the estimated increase of its traffic has been repeatedly laid down by the Supreme Court of Arkansas.

In Missouri Pacific R. R. Co. v. Conway County Bridge District, 204 S. W. 630, the court said:

"One of the members of the board of assessors was introduced as a witness and examined at considerable

length, and there can be no doubt that his testimony, as it might have been accredited by the trial court, was sufficient to uphold the finding of the court. That witness testified, in substance, that the board of assessors in arriving at the benefits divided the county into five zones or regions according to the proximity of the situs of the improvement, and assessed the benefits *by percentage on the value of the property for purposes of county taxation*, the percentage varying according to the distance of the several zones or regions, *but the railroad property was assessed*, as expressly directed by the statute, *by the mile, and not by the acre, and that the percentage of that property was fixed at the highest percentage on the other property assessed by zones. The basis of the assessment of the railroad property was the assessed valuation for general taxation by the State Tax Commission, and the railroad property was assessed per mile at the highest percentage borne by the real property in the zone nearest to the bridge.* The testimony of the witness shows, however, that this method of assessment was not arbitrarily fixed, but that it was determined upon by the members of the board of assessors according to their best judgment as to the fairness, accuracy, and uniformity of that method as the true benefits to be derived from the improvement. The board of assessors had no right to arbitrarily fix a method of assessment which would not result in the ascertainment of the true

benefits so as to work out uniformity in the assessments, but the judgment of the board of assessors must be respected by the courts unless it has been found that their action was arbitrary and had no reasonable basis. Board of Improvement v. Southwestern Gas & Electric Co., 121 Ark. 105, 180 S. W. 764."

In Oates v. Cypress Creek Drainage District, 205 S. W. 293, the court said (p. 295):

"The drainage improvement district law specifically authorizes the assessment of benefits against railroad property within improvement districts, and this court has said that:

" 'Benefits may be assessed against the property of a railroad company, by reason of the construction of a bridge by a bridge improvement district, and although the result of the construction of the bridge is to create competition for the railroad company.' St. Louis & S. F. R. Co. v. Bridge Dist., *supra*.

"It was also announced in the case just cited that in assessing benefits to accrue to railroad property it was proper to consider the probable increase in traffic due to estimated growth in population. It was in evidence that the construction of this system of canals would tend to increase the population because it would make available for cultivation large bodies of lands. The evidence strongly tended to show that the improvement

would greatly improve health conditions, which would benefit all the property in the district, including railroad property."

In Missouri Pacific R. R. Co. v. Monroe County Road Improvement District, 209 S. W. 729, the court held:

"Railroad property is subject to assessment for a local improvement, as a highway, the same as other kinds of realty, the inquiry being to ascertain the enhancement in value or benefits to accrue from the construction of the improvement."

Counsel contend that the term "railroad right-of-way," used in the act creating the district, carries only the unimproved real estate, which should be assessed by the acre like the adjoining real property, regardless of the tracks and station buildings erected thereon.

Under the law of Arkansas, anything permanently attached to the railroad right-of-way is defined as real estate.

The law, as it existed at the time this district was organized, is found in Kirby's Digest, sections 6941, 6942 and 6945:

"Section 6941. Such person, company or corporation shall, on the first Monday in May in the year 1899, and at the same time every second year thereafter, when required, make out and file with the Secretary of State

a statement or schedule showing the length of the main line and all side-tracks, switches and turn-outs in each county in which the railroad may be located and in each city and town in said county through or into which the railroad may run. Act May 4, 1899.

"Section 6942. Such person, company or corporation shall also state the fair and actual aggregate value of the whole railroad, taking into consideration in estimating and fixing such value, the entire right-of-way, as given by the charter of the company or statutes of the State, and also taking into consideration and estimating everything of any character whatever situated upon such right-of-way, and appurtenant to such railroad which adds to the value of such railroad as an entire thing.

"Section 6945. Such railroad, as described and scheduled in sections 6940-6944, shall be held to be real estate for the purpose of taxation, and denominated 'railroad track,' and shall be so listed and valued, and shall be described in the assessment thereof as the railroad track of the.....railroad company, in the county, city or town, and such description shall be considered as embracing all the property required to be assessed by sections 6940-6944, and when advertised and sold for taxes no other description shall be necessary. Act March 31, 1883, section 47."

The Act of May 4, 1911 (Acts of 1911, page 244) provides as follows:

"Section 14. The buildings and side-tracks of railroads shall be assessed as real estate, and each building or side-track shall be assessed in the incorporated town or district where located. Main track shall also be assessed as real estate, and it shall be apportioned for assessment and taxation between the several towns and school districts through which the railroads run according to the actual mileage in each town and district."

Therefore, if the act creating the district had used no word except "lands," it would have been adequate to carry the right-of-way and all tracks and buildings thereon.

Counsel say that all the other lands in the district are placed upon an acreage basis, and that in this respect the railroad is discriminated against. There is nothing in the evidence to justify such an assertion, and it certainly can not be true that the town of Alma, with its expensive brick buildings, is assessed by the acre like farming lands.

Counsel say that it is iniquitous to assess benefits against the railroad because of the increased traffic to be derived from the building of the highway, for the reason that if this traffic is increased, the Interstate Commerce Commission will reduce its rates. This is a mere

assumption, and is contrary to common experience; for we know that those railroads which operate in highly improved and thickly populated regions are the most valuable, and their value is dependent upon their earnings.

We are at a loss to understand the bearing upon this controversy of the ruling of the Interstate Commerce Commission, that in ascertaining the physical value of railroad property, it would not consider sums which had been paid out to improvement districts. This is a very proper ruling, for, of course, such sums do not enter into the cost of the tracks; and if they were calculated as a part of the cost of the track, the consequence would be that, in those jurisdictions like Arkansas, where highways are largely constructed by local improvement districts, the railroad would appear to cost a great deal more than in other States where the highways are built from the proceeds of direct taxation. This would produce a manifest inequality of rates, which can be avoided only by considering in all jurisdictions the actual cost of the property, regardless of taxation, treating the taxes, whether general or local, as a part of the operating expenses.

Counsel cite Chatham County v. Sea Board Air Line, 45 S. E. 566, in support of their contention that the railroad should be assessed merely as acreage property. Such a ruling was, indeed, made in that case, but

only on the ground that, by the statutes in that State, the railroad itself is assessed and taxed as personal property.

Counsel cite Louisville & Nashville Railroad v. Barber Asphalt Co., 197 U. S. 430. In that case the railroad contended that it would not be benefited by the improvement, but rather injured because the lot in question was used only as a right-of-way, and travel along the adjacent street would be a detriment to the railroad rather than a benefit, owing to the risk of accidents; and the court held that, while there might be no benefit as long as the lot was thus used, yet it was not certain that it would always be used as a part of the railroad right-of-way, and the assessment against it would, therefore, be sustained. In that case the court took occasion to say that: "A system of delusive exactness should not be extracted from the very general language of the Fourteenth Amendment in order to destroy methods of taxation which were well known when the amendment was adopted, and which no one then supposed would be disturbed."

Counsel say that the railroad should pay no taxes because the highway constructed by the district stops at the outskirts of the town of Alma, a quarter of a mile from its depot. No doubt the town of Alma makes proper provision for maintaining its streets in good condition, so that the construction of the road within

its limits was unnecessary. It is not shown that any traffic coming over the road would be deterred from proceeding to the station by the condition of the intervening streets.

Counsel say (brief, page 82): "The success of any business and the profit therefrom depends largely upon the efficiency of its management. It is not the intention of the Legislature in this act, or in any other act, to penalize efficiency in conducting business by exacting a greater tax on the land where a business is located, which is efficiently managed, than on land of equal value where the business is neglected."

Unhappily, it is impossible to do otherwise. If a business, located on land, is successful, the land enhances in value. If it is a failure, the land depreciates. All that the assessing officers can do is to consider the value of the land without any regard to the merits or demerits of those who have brought about existing conditions.

Counsel seem to have established that it is the rule in Illinois not to consider the benefits which the improvement will bring to the railroad by the development of the country. The State of Arkansas has an equal right to adopt a different rule, particularly when the rule which it adopts is the more logical and fair. Among the benefits which any piece of property may expect to derive from the construction of a highway is the increase in its

value which will follow the development of the surrounding region consequent upon the improvement.

APPELLEE SHOULD TENDER TAXES ADMITTEDLY DUE.

Counsel say that the present law in Arkansas for the taxation of railroads is different from that which was in existence at the time the act creating the district was adopted; and by implication they concede that the tax law, as it stood at the time the district was created, was valid. If so, they should continue to pay the taxes as assessed under that act until a valid act has been passed. As it was said by this court in the State Railroad Tax Cases, 92 U. S. 616:

"It is equally clear that the road-bed within each county is liable to be taxed at the same rate that other property is taxed. Why have not complainants paid this tax? In reference to the latter, it is said, that they resist the rule by which the value of their road-bed in each county is ascertained, and therefore resist the tax. But surely it should pay tax by some rule. If the rule adopted gives too large a valuation in some counties, it must be too small in others. What right have they to resist the tax in the latter case? And in the former, is the whole tax void because the assessment is too large? Should they pay nothing, and escape wholly because they have been assessed too high? These questions an-

swer themselves. Before complainants seek the aid of the court to be relieved of the excessive tax, they should pay what is due. Before they ask equitable relief, they should do that justice which is necessary to enable the court to hear them.

"It is a profitable thing for corporations or individuals whose taxes are very large to obtain a preliminary injunction as to all their taxes, contest the case through several years' litigation, and when in the end it is found that but a small part of the tax should be permanently enjoined, submit to pay the balance. This is not equity. It is in direct violation of the first principles of equity jurisdiction. It is not sufficient to say in the bill, that they are ready and willing to pay whatever may be found due. They must first pay what is conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted. The State is not to be thus tied up as to that of which there is no contest, by lumping it with that which is really contested. If the proper officer refuses to receive a part of the tax, it must be tendered, and tendered without the condition annexed of a receipt in full for all the taxes assessed."

Here the Circuit Court of Appeals set aside the decree of the chancery court and enjoined the collection of taxes from the railroad, without requiring it to tender

with its bill the taxes actually due. There can be no doubt that its railroad right-of-way, with the track thereon, and its depot grounds and station houses, are things of very material value, and real property, which should be subject to taxation; and until a tender of the amount of taxes lawfully due is made, no injunction should have been ordered.

Counsel say that the present assessment laws of Arkansas are unconstitutional in their application to this district. If so, they do not, as to this district, repeal the law as it existed at the time of the district's creation. It is the well settled law of Arkansas that an unconstitutional act does not repeal a prior constitutional statute, even though it contains a clause of express repeal.

Alexander v. Board of Directors Crawford County Levee District, 97 Ark. 322.

Eason v. State, 11 Ark. 481.

Union Sawmill Co. v. Felsenthal, 85 Ark. 346.

St. L., I. M. Ry. v. State, 86 Ark. 343.

Ex Parte Merritt, 80 Ark. 203.

Polk v. Booker, 112 Ark. 101.

TAXATION OF FRANCHISE.

The decision of the court below was based upon the idea that in estimating the value of the railroad, the

value of its franchises was considered, and that the franchises, being personal property and interwoven with the assessment of the real estate, there could be no valid assessment for improvement taxes.

The best answer to this is found in the language of Mr. Justice Miller, in the State Railroad Tax Cases, 92 U. S. 608, where he says:

"But, as we have already said, a railroad must be regarded for many, indeed for most purposes, as a unit. The track of the road is but one track from one end of it to the other, and, except in its use as one track, is of little value. In this track as a whole each county through which it passes has an interest much more important than it has in the limited part of it lying within its boundary. Destroy by any means a few miles of this track within an interior county, so as to cut off the connection between the two parts thus separated, and, if it could not be repaired or replaced, its effect upon the value of the remainder of the road is out of all proportion to the mere local value of the part of it destroyed. A similar effect on the value of the interior of the road would follow the destruction of that end of the road lying in Chicago, or some other place where its largest traffic centers. It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised than to ascertain the value of the whole road, and apportion

the value within the county by its relative length to the whole."

In determining the value of property, it is necessary always to consider the uses to which it can be put. A railroad track, without the authority to transport upon it passengers and freight, would be worth only the price for which the rails and ties could be sold as scrap, and the land for agricultural purposes. It is the fact that the railroad possesses a franchise as a carrier that gives the property its peculiar value. This franchise is attached to the railroad, to the right-of-way, the tracks, station houses, and rolling stock. It is what gives life and activity to the whole body; and in determining the value of the several parts of the railroad, the only fair method is to apportion the value of the franchise amongst them, as is provided in the Arkansas statute.

Suppose, for example, that a mine had a private right-of-way, which enabled it to transport its ore to market, and without which it would be cut off from the world; in estimating the value of the mine, would you not necessarily have to take into consideration the right of way which enabled it to operate? So, if, in an arid country, a farm had a right to a supply of water for irrigation, and without the water it could not be cultivated; in estimating the value of the land, would not the fact that it was entitled to a supply of water be an indispensable element in the computation? So, if a water

mill was erected, would not its right to the water supply be an important factor in determining its worth? In all of these, and in a thousand similar cases which could be imagined, a right, which in itself is a mere chose in action and might be classed as personalty, is the thing that gives the chief value to the real estate, so that in any estimation of the value of the land, these incidental rights must be taken into consideration.

ESTOPPEL.

One of the oldest maxims of equity is that, "He who comes into equity, must come with clean hands." When the railroad sought an injunction against these taxes, the question arose whether it had been guilty of any conduct making the granting of the injunction inequitable.

In this case it knew that the work was being done. It transported over its line hundreds of cars, loaded with road material, and delivered them at Alma. The work was carried on in full sight of its trains. It does not pretend to have been ignorant. Yet, it deferred bringing this suit until the road was practically finished, when it had received all the compensation which it could earn by hauling the materials, and when it was assured of the increased traffic which would result from the road's construction. If there ever was a case for the application of the doctrine of estoppel it is this.

In Fitzgerald v. Walker, 55 Ark. 148, the tax payers stood by while the road was being built, and it was held that after its completion it was too late for them to enjoin the collection of the taxes. In this case, the railroad has not merely stood by, but has taken an active part in the construction of the highway, and has received large compensation for the hauling of the material.

The only excuse that is offered for the conduct of the railroad is in the testimony of its counsel, who says that the contractor told him that he would not accept the bonds of the district in payment for the work. This shows that the railroad was actually informed of the existence of the act creating the district, and was keeping a watch upon it; and when it saw that the work was actually progressing, it necessarily knew, either that the contractor had changed his mind, or that the bonds had been disposed of to other parties.

LOCAL STATUTE NOT VOID BECAUSE NO NOTICE GIVEN.

Counsel say that the act is void because no notice of the intention to introduce the bill was published.

The Constitution of Arkansas requires that notice be given of the intention to introduce a local bill; but it has always been the settled law in Arkansas that the question whether notice has been given or not is for the Legislature to determine; that when the Legislature

passes the statute, it is a conclusive finding that the constitutional requirement has been complied with; and that the courts can not inquire whether the notice was given in point of fact.

Davis v. Gaines, 48 Ark. 381.

Waterman v. Hawkins, 75 Ark. 120.

Caton v. Drainage District, 87 Ark. 8.

St. Louis S. W. Ry. Co. v. State, 97 Ark. 478.

We submit that this construction of the Arkansas Constitution by the highest court of the State, which was first announced in the year 1886—twenty-five years before the passage of this act—and which has been reiterated many times since, is conclusive upon the Federal courts. Even counsel, themselves, must concede that the presumption would be in favor of the publication, and that the burden of proof would rest upon them to show that no publication was made. To meet this burden, they introduce the editor of the newspaper at Alma, who testified that no such notice was published in his paper. The statute on the subject, however, which is found in Kirby's Digest, sections 3718 and 3719, passed in 1874, is as follows:

"Section 3718. It shall be unlawful for any local or special bill to be passed by the General Assembly unless thirty days' previous notice of the intention to apply

therefor shall have been published as hereinafter provided.

"Section 3719. Such notice shall be published by hand-bills (printed or written) conspicuously posted in at least five of the most public places in the locality where the matter or thing to be affected shall be situated, or by publication in some newspaper of general circulation in said locality."

There is no attempt to prove that publication of the intention to introduce the bill was not posted in the manner authorized by the act, nor is it shown that it was not published in a newspaper of general circulation in the locality. It is quite likely that newspapers published in Van Buren, the county seat, had a more general circulation within the district than the little paper published at Alma; and the publication may well have been in a Van Buren paper. To set aside the legislative action, the proof should be conclusive, and here it is not even slightly persuasive.

The contention of counsel that the passage of an act creating a local improvement district, without the publication of notice, is an impairment of the contract rights granted by the railroad's charter, is so fantastic that it can not be seriously argued, particularly in view of the decision of this court in St. Louis, Iron Mountain

& So. Ry. v. Berry, 113 U. S. 465, that the charter rights claimed by the plaintiff do not exist.

It was decided by this court in Wagner v. Baltimore, 239 U. S. 219, that a legislative assessment can be made without notice; and such is the established law of Arkansas.

St. Louis S. W. Ry. v. Grayson, 72 Ark. 120.

Respectfully,

W. E. HEMINGWAY,

G. B. ROSE,

D. H. CANTRELL,

J. F. LOUGHBOROUGH.

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No. 82

IN THE

Supreme Court of the United States

OCTOBER TERM, 1919

J. H. BRANSON, Sheriff and Collector of Crawford County, et al., ... *Appellants*

vs.

B. F. BUSH, Receiver of the Property of the St. Louis, Iron Mountain & Southern Railway Company ..... Appellee

STATEMENT AND BRIEF OF ARGUMENT

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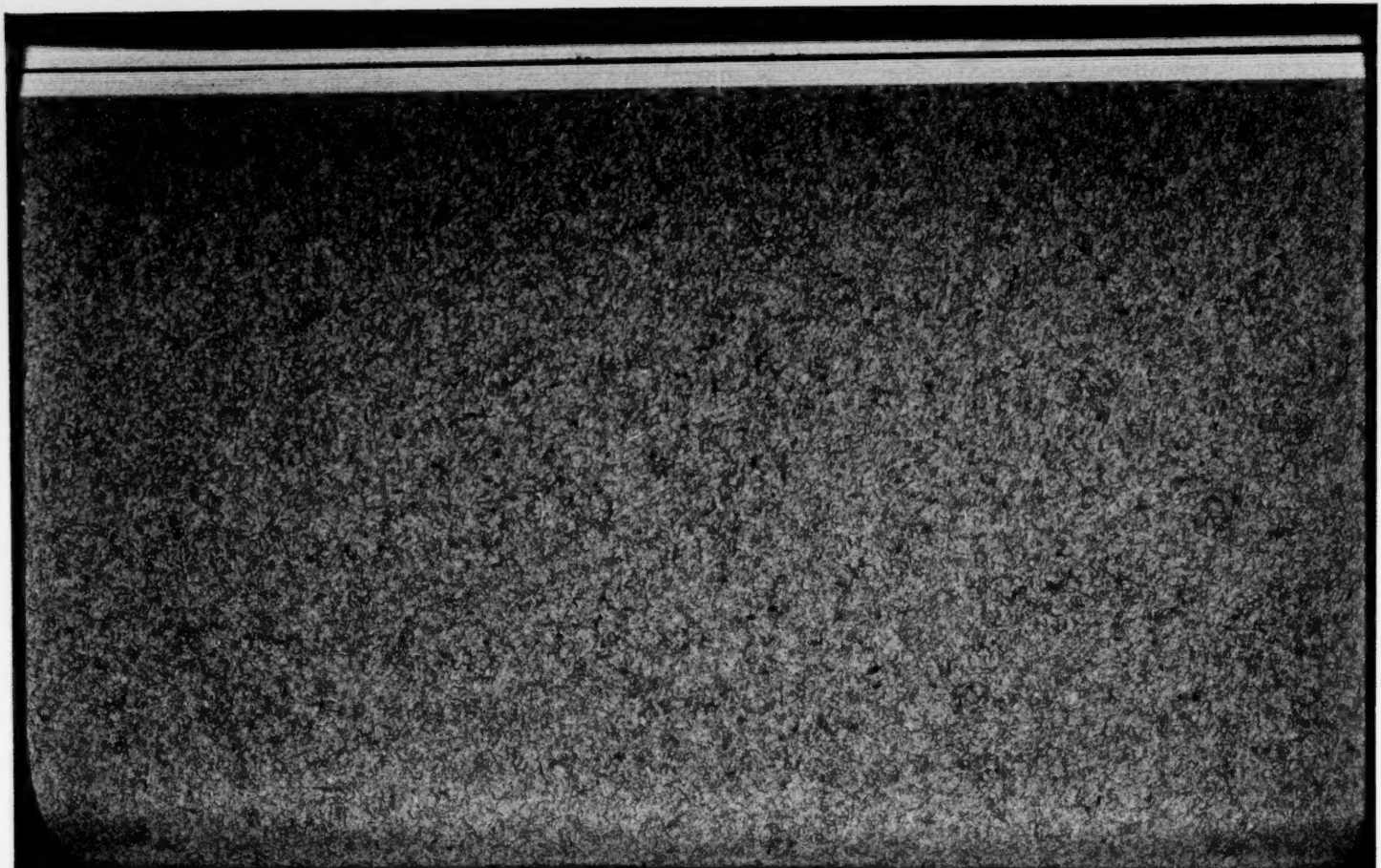

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No. 82

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vs.

B. F. BUSH, Receiver of the Property of the St. Louis, Iron Mountain & Southern Railway Company ..... Appellee

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STATEMENT

Supplementing the statement of facts in "Brief for Appellant:" This Special Act of the Legislature was passed in 1911, and certain Commissioners were named therein to carry out the provisions of the Act, some of whom resigned and others were appointed, but the construction of the improvement did not begin until the latter part of the year, 1914. (Rec. 37).

The Act among other things provides:

"Section 1. The *lands* hereinafter described are hereby made an Improvement District for the purpose of building a highway in Crawford County, Arkansas, * *"

"Section 3. The territory embraced within the said district shall be the corporate limits of the incorporated town of Alma, and Sections 4, 5, 6, 7, 8, 9, 16, 17, 18, 19, 20 and 21, in Township 9 North, Range 30 West, in Crawford County; *and all railroad right-of-way situated in any of the lands in the said District.*"

"Section 5. It is ascertained and hereby declared that all real property within said district, including railroads and tramroads, will be benefitted by the building of the said highway more than the cost thereof as appropriated in the county assessment of each piece of property within the district, for this and the succeeding years, and the cost thereof is made a charge upon such real property, superior to all other mortgages and liens for the ordinary taxes, and for improvement districts heretofore organized; and the said Commissioners are authorized and directed each year to levy upon *said land* an amount sufficient to pay the necessary expenses of the district for that year, and all interest and principal of bonds maturing, and all installments of the sinking fund, if any such there be, which assessment is to be collected from

the owners of real property, railroads, and tramroads in the manner hereinafter provided, and in proportion to their respective assessments as shown by the then county assessment."

"Section 6. The Secretary of the Board shall each year, on or before the first day of January, make out and deliver to the Collector of Crawford county a book showing all lands, railroads and tramroads within the district, in parcels, as the same appear upon the County assessment books of Crawford county, the name of the owner there appearing, and the amount of taxes to be collected for Crawford County Road Improvement District No. Two, as levied by the Commissioners of said District, and it is made the duty of the Collector of said County to collect said taxes, along with other taxes, and for his services the collector shall have and receive the same commission that he is allowed for collecting the taxes of the county and State. Said taxes, when collected, shall be paid over to the treasurer of the district at the same time that he pays over the county funds. If the collector shall fail to collect taxes hereby provided for, along with the other taxes, he shall be subject to a penalty of One Hundred ($100.00) Dollars, for each instance in which he shall collect from an individual the other taxes and omit the road tax provided for

herein, unless said road tax has been enjoined by a court of competent jurisdiction, the said penalty to be recovered in a suit by the Commissioners to the use of the District."

The secretary of the commission under the provisions of the Act certified to the sheriff and collector a book containing the assessment of benefits against the property of appellee and the installment of taxes thereon to be collected, (Rec. 9) and this suit was brought by appellee to enjoin the collection of the tax.

This Special Act of the Legislature creating this Road Improvement District was approved April 28th, 1911; thereafter on May 4th, 1911, Act No. 251, "An Act to provide the manner of assessing for taxation the property of Railroads, Express, Sleeping car, Telegraph, Telephone and Pipe Line Companies," was approved. (Acts 1911, page 233).

This Act changed the method of assessing Railroad property, and among other things, it provides:

> "Section 1. Every railroad chartered, organized or operated under the provisions of Chapter 133 of Kirby's Digest, shall for the purpose of taxation be held to be a railroad and shall be assessed for taxation by the Arkansas Tax Commission. Said Commission shall ascertain

the par value of all property, tangible and intangible, including the franchises (Except the right to be a corporation) * * *"

"Section 2. The franchise (other than the right to be a corporation) of all railroads, express, telegraph and telephone companies, are declared to be property for the purpose of taxation and the value of such franchises shall be considered by the assessing officers when assessing the property of such corporations. In valuing for assessment purposes the property of such corporations, the Arkansas Tax Commission shall determine the total value of the entire property of the corporation, tangible and intangible."

Section 9, requires all railroad companies to file a schedule with the Tax Commission, "Said schedule shall show the total number of miles of main track of railroad owned and operated by such person, company or corporation in other states and the total number of miles of main track owned or operated in this state. Likewise it shall set forth the num- of miles of track on which said rolling stock is used in other states.

"Section 10. Said statements or schedule shall state the actual full and true value in detail of the several items listed, also the aggregate value of the whole railroad, and there shall be taken into con-

sideration in fixing said value the entire right-of-way as given by the charter of the company or statutes of the state, the franchises, privileges and everything of any character whatever situated upon the right-of-way of the road connected with or appertaining to it in any way which adds to its earning power or gives the railroad value as an entire going thing."

Section 12 provides that the commissioners shall meet the first Monday of July each year for the purpose of assessing the railroad property of the State, and it further provides, "In valuing the property of every railroad the Commission shall take into consideration the entire road, whether all or only part of it is in this State."

Section 18 provides, that when the value of the property of the railroad is ascertained it shall be the duty of the Chairman and Secretary to certify out to the assessor of each county in which any railroad is located, so much of said value as is located in said county."

Before this Act of the Legislature was passed, the Governor, Secretary of State and Auditor of State constituted the Board of Assessors to assess railroad property in this State (Sec. 6938-39, Kirby's Digest of the Statutes of Arkansas.) Under the law existing at that time the assessments were made upon an entirely different basis; Sec. 6938 to 6954 Inc., Kirby's Digest, which provide:

Sec. 6938—

The governor, secretary of state and auditor of state are constituted a Board of Railroad Commissioners for this State.

Sec. 6939—

On the first Monday in June in each year they shall proceed to ascertain the value of all property, including railroad track, rolling stock, water and wood stations, passenger and freight depots, offices, furniture and such other property, real and personal, as is owned by each of the railroads, etc.

Sec. 6940—

Every person, company or corporation owning or operating a railroad in this state shall return sworn lists or schedules of taxable property of such railroads as hereinafter provided. Such property shall be listed and assessed with reference to its amounts, kind and value on the first Monday in May of the year in which it is listed.

Sec. 6941—

Provides for the filing of such schedule with the Secretary of State.

Sec. 6942—

Such person, company or corporation shall also state the fair and actual aggregate value of the whole railroad, taking

into consideration in estimating and fixing such value, the entire right of way, as given by the charter of the company or statutes of the state, and also taking into consideration and estimating everything of any character whatever situated upon such right of way, and appurtenant to such railroad which adds to the value of such railroad as an entire thing.

Sec. 6943—

Provides that such statement or schedule shall be verified.

Sec. 6944—

Provides for the filing of schedules of new companies.

Sec. 6945—

Such railroad, as described and scheduled in Sections 6940-6944, shall be held to be real estate for the purpose of taxation, and denominated "railroad track," and shall be so listed and valued, and shall be described in the assessment thereof as the railroad track of the..... railroad company, in the county, city or town, and such description shall be considered as embracing all the property required to be assessed by sections 6940-6944, and when advertised and sold for taxes no other description shall be necessary.

Sec. 6946—

Provides that the movable property shall be held to be personal property, and denominated rolling stock and requires list of such property to be filed with the Secretary of State.

Sec. 6947—

The Board of Railroad Commissioners shall meet on the first Monday in June, each year, at the office of Secretary of State, and, after being duly sworn to fearlessly, impartially and honestly discharge their duties, shall proceed to examine the list of schedules of the description and value of the railroad track of the railroad companies filed with the Secretary of State. in accordance with the requirements of this act, and if said schedules are made out in accordance with the provisions of this act, and, in the opinion of the board, the value of said railroad track is fair and reasonable, said board shall appraise the same, and it shall be the duty of the Secretary of State to certify to the assessors of each county in which said railroad is located so much of said list as values such railroad track as is located in said county, and in any city or town of such county, and such assessors shall list and assess the same as real estate, by the description as hereinbefore specified.

Sec. 6948—

Provides the method of ascertaining the value of rolling stock.

Sec. 6949—

Provides that all other personal property except rolling stock shall be listed and assessed in the county where ever the same may be, and that all other real estate shall be listed and assessed by the assessor of the county in which they are situated, "at the same time and in like manner as real estate belonging to individuals is by this act required to be listed and assessed."

Sec. 6950 to 6954, inclusive—

Provide the method of enforcing the filing of such schedules with the commission and the penalty for failure to do so.

Pursuant to the authority vested in the Commissioners, they improved a highway of a little less than three and one-half miles in length. (Rec. 36).

The estimated benefits as provided by said Act, were to be on the basis of the value of the property within the District, as fixed by the last county assessment.

There is approximately 7,700 acres of land within the District, fifty-three acres of which belongs to this appellee, and is occupied by its main

railroad track, passing track and station and the necessary grounds adjacent thereto. There was no county assessment made by the county officers or county assessor of Crawford county of appellee's property. (Rec. 36). The commissioners of the district, however, in assessing benefits for the construction of said improvement used the county assessor's valuation of the property within the district as a basis on all property with the exception of the property of this appellee, and in assessing its benefits they used the valuation of its property as fixed by the State Tax Commission.

The undisputed testimony also discloses that the North end or terminus of the highway constructed under the provisions of said Act, was about one-fourth of a mile south of the most southerly portion of any property owned by this appellee. The undisputed testimony further discloses that the construction of said highway could not, and did not, facilitate in any way the operation of said appellee's railroad, nor increase the revenues thereof, and that it did not enhance the value of its property in any particular.

The evidence on the question of the benefits assessed against the property of the appellee was as follows:

> R. C. WHITE, testified: That he was engineer of Maintenance of Way of the St. Louis, Iron Mountain & Southern

Railway Company from October, 1914, to January 1st, 1917, and that his duties as such engineer of Maintenance of Way was handling engineering matters in this Southern District, which included improvement matters in a general way of the property, and also the handling of improvement district matters along the line in connection with Drainage Districts and Road Districts, and that the plaintiff's line of railroad between Little Rock, Arkansas, and Van Buren, Arkansas, was a portion of the plaintiff's property which came under his jurisdiction; that he is familiar with the road which it is proposed to be improved under the Act of the General Assembly of the State of Arkansas of 1911, creating Crawford County Road Improvement District No. 2; that the said road is approximately three and one-half miles in length; that plaintiff would be required to pay approximately twenty-eight per cent of the cost of the entire improvement; that he has been connected with the plaintiff company ten years, and is in a general way familiar with the location of the proposed road, and said road is not now and will never be of any benefit to the plaintiff; that it has not enhanced the value of plaintiff's property or the value of the railroad in any way, and it does not in any way facilitate the operation of trains over the plaintiff's railroad, and it is of no direct benefit to the railway. (Rec. 33-34).

JOHN O'BRIEN, testified: That he had been working in the Engineering Department of the railroad since the Spring of 1911, and is acquainted with the road to be improved in what is known as Crawford County Road Improvement District No. 2. All of the road to be improved is not within the District; part of it extends outside the line of the district, the exact portion being between one-eighth of a mile and a quarter of a mile, the entire length of the road is a little less than three and one-half miles. I made an investigation in 1914 of the assessed valuation of all property within the District, also as to the amount of the assessed valuation of plaintiff's property within the District, and estimated the probable cost of improving the road, and found that upon that basis, plaintiff would be required to pay 28 per cent of the probable cost of constructing same. If the assessment had been made upon an acreage basis the plaintiff would have been assessed upon 53 acres, while there is 7,700 acres in the entire district, and if plaintiff's property had been assessed upon an acreage basis in proportion to other property in the district that they would have been required to pay seven and one-tenth of one per cent instead of twenty-eight per cent under the plan which was adopted for the assessment, in other words, seven and one-tenth of one per cent of the acreage composing the district, which

belongs to the plaintiff Railway Company, was assessed at twenty-eight per cent of the entire cost of the proposed improvement. I do not believe that the improvement of the road within said road improvement district was of any benefit to the Railway Company, and it did not facilitate the operation of trains over the road, nor increase the value of property. No portion of the road connects with the right of way of the Railway Company, and it is about a quarter of a mile from the northern end of said road to the railroad right of way. (Rec. 36-37).

W. C. MORSE, testified: That he is superintendent of the railroad; has been connected with the company since 1882, and that as superintendent, matters affecting property of the company comes under his jurisdiction; that he is familiar with the matters in controversy growing out of the proposed improvement in connection with Crawford County Road Improvement District Number 2; that he has looked over the proposed road as well as the location thereof; that he does not see how the construction could be of any benefit to the Railway Company; that there is no way by which the construction of said road could or would be of special benefit to the Railroad Company or its property. (Rec. 37).

R. E. WARDEN, testified: That he is assistant engineer for the railroad, and

has been connected with the system about twenty years, and has made investigations of this road; that the construction of said road will not, and did not enhance the value of the property of the plaintiff in any way, or any portion thereof, and did not and does not facilitate its operation. (Rec. 38).

DEFENDANT'S EVIDENCE

J. R. CRIGLER, testified: That he resides at Alma and is engaged in the practice of medicine; that he owns no real estate in the district, but is interested in the road as he goes over it every day; that in his opinion the road is a benefit to the railroad. (Rec. 40).

J. J. CRAVENS, Merchant, testified: I cannot say as to whether or not the revenues on the railroad at Alma will be increased by the improvement of this road; I am under the impression that they would be; I don't know. (Rec. 41).

I. S. HAMER, testified: I think it would help the traffic of the railroad, but I don't know anything about the running of the railroad; I do not know what effect it would have on the railroad; it helps the people who live down there along the road, but so far as the railroad is concerned, and so far as its revenues are con-

cerned, I do not know as to whether it would effect or help it or not. (Rec. 42).

This was all the evidence introduced at the trial on the question of benefits.

The Circuit Court of Appeals in its opinion in this case has arranged the questions presented, as follows:

> The issues involved is the liability of the appellant, the receiver of the St. Louis, Iron Mountain & Southern Railway Company, duly appointed in a proceeding to foreclose a mortgage executed by the Railway Company, for assessments on the railroad property, for the construction of a road by a Road District, created by a Special Act of the General Assembly of the State of Arkansas, approved April 28th, 1911, Act 228, Session Acts of Arkansas, page 642.
>
> The legality of the assessment is attacked upon several grounds.
>
> 1. That under the provisions of the Act, Sec. 5, the railroad's property was assessed on its three and six-tenth miles within the district for a sum equal to 28 per cent of the entire cost of the road.
>
> 2. That the assessment not only included the realty of the railroad, but also its rolling stock and materials, which under the constitution and laws of the State of Arkansas are personality, amounting to $6,770.00, the tax thereon being $44.59

annually for the term of twenty years; that the latter is a violation of Sec. 11, Art. 17 of the Constitution of the State and Sec. 5 of this Act, and also in violation of the equal protection clause of the Fourteenth Amendment, no other person's or corporation's property being so assessed.

3. That Section 5 of the Act provides that the county assessment is adopted, as conclusively determining the benefits from the construction of the road, and that under the laws of the state the property of the railroads is not assessed by county assessors, but by the State Tax Commission.

4. That the State Tax Commission is required by the laws of the State to include in the assessment of the railroad property the value of its franchise, in addition to its tangible property, and therefore places a greater burden on the railroad than on other property, in violation of the Constitution of the United States and the Fourteenth Amendment.

5. The Act was enacted without notice or investigation, and arbitrarily fixed the charge, in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

6. The assessment is void because based on the mileage basis of defendant's

property, whereas all other property is on the acreage basis.

7. It is also claimed that the tax is void so far as it taxes the property of the railroad, because it is in no wise benefitted by the building of the road.

8. That the Act creating the District is in violation of the constitutional provisions of the State of Arkansas, Sec. 26, Art 5, this being a Special Act, and no notice thereof was published as required by that constitutional provision.

BRIEF OF ARGUMENT

I

The Act of the Legislature creating this Road Improvement District was enacted shortly prior to the change that was made by the Legislature in the method of assessing railroad property in the State of Arkansas, and the Act was never changed to conform thereto, therefore the basis for the assessment of benefits against railroad property, as contemplated by the Act, was abrogated by the subsequent Act of the Legislature and no other basis substituted by the Legislature.

The contention of counsel for appellant, that the court should substitute the basis of a possible increase in traffic is not warranted by the language of the Act itself; it will be noted that the first section of the Act, in part, provides:

> "The *lands* hereinafter described are hereby made an Improvement District."

And the third section of the Act in describing what is included in the District, in part, reads:

> "The territory (lands) embraced within the said district shall be the corporate limits of the incorporated towns of Alma * * *, *and all railroad rights-of-way situated in any of the lands in the said district.*"

Therefore all the property that is included within the district, under the terms of this Act are *lands and railroads rights-of-way*, nothing else can be included or taxed.

It will further be noted that the first and third sections are the creative part of the Act, they describe the district and the property therein subject to taxation, and no other can be included.

> "Expression of one thing sometimes implies the exclusion of another." Watkins v. Wassell, 20 Ark. 410; Little Rock & Ft. Smith R. R. Co., v. Clifton, 38 Ark. 305.
>
> "A railroad right of way is generally an easement in land used for railroad purposes"; Territory of New Mexico v. U. S. Trust Co., 172 U. S. 171.

The only property mentioned and included in the Act which the Commissioners of the Improvement District would have a right to tax for the construction of the highway would be lands and "railroad rights-of-way," and this fact is emphasized by the language used in Section 5 of the Act, "And the said Commissioners are authorized and directed each year to *levy upon said land* an amount sufficient to pay the necessary expenses of the district for that year, * * * which assessment is to be collected from the owners of real property, railroads and tramroads in the manner hereinafter

provided, and in proportion to their respective assessments as shown by the *then county assessment.*"

The Supreme Court of Arkansas in the case of Board of Improvement District Number 60 v. Cotter, 71 Ark. 561, in discussing the proper construction of Acts of this character, states:

> "It is the duty of the court, in construing a statute, to give effect to every word and clause thereof, so that none are rendered void, superfluous, or insignificant. (Citing authorities). Again, this court, quoting from Sutherland on Interpretation of Statute, has said: 'Statutes which impose burdens and liabilities unknown to the common law should be construed strictly in favor of those upon whom such burdens are imposed.' "

In Watkins v. Griffith, 59 Ark. 357, the court says:

> "A statute delegating authority to charge property with the expense of local improvements must be strictly pursued. What the Legislature has prescribed must be done, and cannot be declared to be merely directory and immaterial. Merrit v. Port Chester, 71 N. Y., 309; matter of Pennie, 108 N. Y., 373."

And in the same opinion the court quoting from Judge Dillon, says:

> "Says Judge Dillon, one of the ablest and clearest law writers in the books:

> 'As the authority to make local assessments does not exist unless legislatively conferred, so it can be exercised no further than it is clearly given, and if the mode in which the authority shall be exercised is prescribed, that mode must be pursued. 2 Dillon Mun. Corp., Sec. 769."

There is certainly nothing in this Act of the Legislature which would warrant the suggestion that the traffic both intrastate and interstate should be taxed in fixing the assessment of benefits against railroad property.

II

ASSESSMENT OF BENEFITS IN IMPROVEMENT DISTRICTS IN ARKANSAS

Counsel for appellant in his brief, further states:

> "This is an Arkansas case and in matters of local improvements this court is loathe to interfere with the public policy of the respective states."

The Supreme Court of Arkansas, as far back as 1887, has held:

> "Special benefits to the property assessed, that is benefits received by it in addition to those received by the community at large, says Judge Dillon, is the

true and only solid foundation upon which local assessments can rest. They are based upon the assumption that the persons upon whose property they are imposed are SPECIALLY and PECULIARLY benefitted in the enhancement of the value of their property by the expenditure of the money collected on the assessment and while they are made to bear the cost of the local improvement, they, at the same time, suffer no pecuniary loss thereby." Rector v. Board of Improvement, 50 Ark. 116-129.

"The benefits which will be thus considered, must be those which are *local, peculiar and special* to the owner's land, who has been required to yield a portion *pro bono publico.*" Cribbs v. Bennett, 64 Ark., 555-559.

"If the property is not benefitted, it is not subject to this assessment." K. C. P. & G. Ry. v. Siloam Springs, 68 Ark. 376-380; Ahern v. Board of Improvement, 69 Ark. 68-73.

"Special assessments for local improvements find their only justification in the *peculiar* and *special* benefits which such improvements bestow upon the *particular property assessed.* Therefore, any statute which authorizes an assessment greater than the special benefits to the property would be unconstitutional." Spiewell v. Fencing Dist., 71 Ark. 17-27; Kirst v. Improvement Dist., 86 Ark. 1-8.

"Local assessments levied to sustain them are imposed upon the property of persons who are *specially* and *peculiarly* benefitted in the enhancement of the value of their property by the expenditure of the money collected on the assessments.

The benefits need not be exclusive; the general public may also derive benefits in a more remote degree, yet if there is a *special* and *peculiar* benefit inuring to adjoining property, local assessments are justified." Shibley v. Fort Smith & Van Buren Dist., 96 Ark. 410-416.

"We have never held, nor are we aware that any other court has ever held, that assessments of local improvements may be assessed according to value as such, but such assessments are always sustained distinctly upon the assumption that the benefits will accrue in proportion to such value." Alexander v. Board of Directors, Levy Dist., 97 Ark. 322-331.

"The benefits must be special and peculiar and if there are no special and peculiar benefits, the assessment cannot be made." Board of Improvement v. Pollard, 98 Ark. 543-549.

And the same rule is announced by this court:

"The benefits must be special and peculiar and if the exaction from the owner is in excess of the special benefit, it is the taking of private property in the

> guise of taxation for public use without compensation and if the assessment is more than the 'Exceptive benefit' the assessment is void." Norwood v. Baker, 172 U. S., 269-278-284-5.

Under these decisions there is clearly no evidence to support an assessment of benefits against the property of the Railroad Company under this Act.

The witnesses who testified on behalf of the plaintiff and who were men of experience in railroad matters state that the improvement of this highway would not be of any benefit in any way to the railroad; this evidence was uncontradicted with the single exception of that of a doctor, engaged in the practice of medicine, and who used the road every day, and who had no property to be taxed in the district, stated, that in his opinion "the railroad is benefitted by the road." The other two witnesses who testified for the defendant stated that they did not know whether the building of the road would be of any benefit to the railroad or not, and one of them was frank enough to say, "I don't know anything about the running of a railroad. Don't know what effect it would have on the railroad. It helps the people who live down there along the road, but so far as the railroad is concerned, I do not know as to whether it would effect or help it or not." (Rec. 42). This evidence

is fully set forth in the opinion delivered by the Circuit Court of Appeals. (Rec. 46).

III

UNDER THE LAW AS IT EXISTED AT THE TIME THIS ACT WAS APPROVED THE FRANCHISE VALUE OF A RAILROAD WAS NOT TAXED.

Kirby's Digest of the Statutes of Arkansas, Sec. 6942, provides that in the assessment of railroads, the property that should be included is as follows:

> "The entire right-of-way, as given by the charter of the company or statutes of the state, and also taking into consideration and estimating everything of any character whatever situated upon such right-of-way, and appurtenant to such railroad which adds to the value of such railroad as an entire thing."

And it was not until after the passage of this Road Improvement District Act that the law authorized the Tax Commission to assess the franchise value of a railroad, therefore it is clear that the Legislature, at the time of the passage of this

Act, did not contemplate that the franchise value of a railroad or its traffic should be assessed benefits under the Act, and it is equally clear, that if such a law had been in existence at the time, authorizing the taxation of the franchise value, it would have been discriminatory, unconstitutional and against the provisions of the Act itself, as the Act provided that the assessment of benefits should be levied upon real property in the District.

As stated by the Circuit Court of Appeals in its opinion:

> "But the assessment of railroad property by the State Tax Commission differs materially from that made by the county assessor, as it includes not only the value of all the tangible property of the Railroad Company, but also the intangible property, called the franchise, thereby imposing on it a higher rate of taxation than on all other property of the district, which is clearly in violation of Sec. 5, Art. 16 of the Constitution of the State. Fort Smith, etc., Bridge Co., Ex parte, 62 Ark. 461; Bank of Jonesboro v. Hampton, 92 Ark. 492; State Ex rel. v. Meek, 127 Ark. 349, and the equal protection clause of the Fourteenth Amendment."

The Supreme Court of Arkansas has held that the franchise of a Railroad cannot be assessed for local improvements.

In the case of Fort Smith Light & Traction Company v. McDonough, 119 Ark. 254, in which was involved the right of a Bridge Improvement District to assess benefits against the property of a Street Railway in the City of Fort Smith, the court says:

> "The statute creating the improvement districts provides for the assessment of real property in the district, and a clause thereof provides that 'all railroads, tramroads, right of way, roadbeds and appurtenances in said district shall be assessed according to benefits and increase in value in like manner as herein prescribed for real estate, except that said assessment shall be made per mile' * *"

The court further says:

> "It must readily be conceded, and it is conceded by appellee, that taxation for local improvement must be confined to real estate to be benefitted by the proposed improvement. Personal property is not subject to taxation for that purpose, nor was it attempted in the enactment of the statute under consideration to tax personalty."

And the court after discussing the question as to what constitutes "Real Estate" under the terms of the Act, finally concludes with this statement:

> "But when all this is considered, the answer to the whole argument is that if

> even interurban lines of railroad fall within the classification found in this statute as 'railroads, tramroads, right-of-way, roadbeds,' etc., still that part of the tracks in the city, occupying the public streets not as an exclusive right-of-way but merely as other travelers, under the franchise granted to the company, does not fall within that classification, for the very nature of the right enjoyed under the franchise does not justify classifying it as real estate."

In the case of Bd. of Imp. v. S. W Gas & Elec. Co., 121 Ark. 114, the court says:

> "In the light of the previous decisions of this court, we must assume that the legislature had no intention of including the tracks of street railways, for it is clear from our decisions that the right-of-way granted to a street railway company does not create an interest in the soil, but only grants the right to use the street in common with other travelers, and such a privilege is not *real property* within the meaning of the constitution of this state which provides that property in cities and towns may be specially taxed for local improvements."

In the recent case of Snetzer v. Gregg, 129 Ark. 546, in which the question was involved, the Supreme Court of Arkansas said:

"The statute is novel in this respect, for the attempt to tax personal property for a local improvement has never been undertaken in this State * * *"

"The question is, therefore, squarely presented whether or not personal property can be subjected to taxation for local improvements. This has not heretofore been attempted in this State, as we have already said, nor can we find in the books any example of an attempt in other States to tax personal property as such for the purpose of defraying the expenses of local improvements * * *.

"We are clearly of the opinion that it could not be done. It is said in many decisions that the right to levy a special tax on property to pay the cost of local improvements can be justified only on the theory of special benefit to the property thus taxed. That doctrine has been repeatedly announced in the decisions of this court.

"It follows that personal property cannot be taxed, for the reason that it cannot be specially benefitted by a local improvement. The owner may be benefitted in the enjoyment *of the use* of his personal property in that locality, but the property itself derives no benefit * * *.

"Special assessments are levied on the property itself and not against the owner, as a personal liability, and the

benefit must be to the property itself, rather than to the owner, in order to justify the special taxation. It is otherwise as to general taxation, for the taxation of every species of property is justified however transitory its situs may be within the jurisdiction of the sovereignty which undertakes to impose the tax. Mr. Hamilton in his text book on this subject (Hamilton's Law of Special Assessments, Sec. 275), makes the unqualified statement that one of the cardinal rules for special assessments is that they can be levied only on real estate."

Under Sec. 10 of the Act, "An Act to provide the manner of assessing for taxation the property of railroads, etc.," it is the duty of the Railroad Company to furnish a schedule of "The aggregate value of the whole railroad and there shall be taken into consideration in fixing said value the entire right-of-way as given by the charter of the company or statutes of the State, the franchises, privileges and everything of any character whatever situated upon the right of way of the road connected with or appertaining to it in any way which adds to its earning power or gives the railroad value as an entire going thing."

And in Section 12, it is made the duty of the Tax Commission, "In valuing the property of every railroad the Commission shall take into consideration the entire railroad, whether all or only part of it is in this State."

And Section 18 provides, "It shall be the duty of the Chairman and Secretary of the Tax Commission to certify out to the Assessor of each county in which any railroad is located, so much of said value as is located in said county."

It is therefore established beyond controversy that the assessment of benefits against the property of the appellee in this Road Improvement District was based, not only upon the value of its real estate, but upon the value of "the franchises, privileges and everything of any character where ever situated."

It is alleged in the complaint (Rec. 5) and not denied in the answer, that Plaintiff's line of railroad extends into and through the States of Arkansas, Missouri, Louisiana and other States, and that it was engaged in interstate commerce. Its property, franchises and privileges in these various States became and was the basis upon which the assessment of benefits levied by the Commissioners of this Road Improvement District was made. This is not only contrary to the terms of the Act creating this Road Improvement District, but, as was said by the Circuit Court of Appeals in its opinion, is a discrimination against the property of this appellee.

The Supreme Court of North Carolina in the case of Chatham County v. S. A. L. Ry. Co., 45 S. E. Rep., 566, says:

> "An assessment levied by county commissioners under a statute creating a stock law district against the roadbed, etc., of a railroad, based on a valuation arrived at by valuing the right-of-way as an entirety, and apportioning to the county such part of the whole value as the length of the road in the county bore to the entire road was invalid."

This decision was based upon the fact that other elements of value in addition to the land and the improvements were included.

In the case at bar, the Act did not provide for such a basis, as the law at that time did not authorize it, but as before suggested, no change in the Act was ever made to conform to the change made by the subsequent Act of the Legislature changing the basis of the valuation of railroad property for taxation purposes.

IV

HIGHWAYS AND IMPROVEMENTS JUSTIFYING A LOCAL ASSESSMENT AGAINST RAILROADS.

Under this head, counsel for appellant realizing that the Act of the legislature of 1911 changing

the mode of assessing railroads, which repealed the law in effect at the time this Road Improvement District was created, and which left the District without any legal basis for the assessment of benefits against railroad property embraced in the District, seeks to advance as a basis upon which the assessment of benefits as made should be permitted to stand, "The use of the property," or the possibility that the traffic over the railroad may be increased by reason of the improvement of the highway.

This would be contrary to many decisions of the Supreme Court of Arkansas.

In the case of Snetzer v. Gregg, Supra, the court says:

> "The owners may benefitted in *the enjoyment of the use of his personal property in that locality, but the property itself derives no benefit.*"

In the case of New York, New Haven & Hartford Ry. Co. v. Village of Ft. Chester, 134 N. Y. Supplement 883, the appellate division of the New York Supreme Court, said:

> "The only benefit that the learned corporation counsel specifically claims will inure to the railroad company from these improvements is an increase in its business following the increase in business and population resulting to the vil-

lage from the improvement of its streets. This alleged benefit is too conjectural, fanciful and remote for consideration, and it seems highly improbable that the legislature intended to tax the right-of-way on any such assumption. The corporation counsel's reasoning, if valid, would logically permit the taxation of any railroad right-of-way running through any village or city for general street improvements therein, however far from its right-of-way. Moreover, such a rule confuses the appellant's business growth with the value of its real estate."

In the case of Cache River Drainage District v. Railway, 255 Ill., 398, 99 N. E. 638, the court said:

"In these rulings on the evidence and in refusing this instruction the court committed error. The indirect, uncertain and speculative benefit which may be derived from the increase of agricultural production and passenger traffic is not an element to be considered in assessing benefits to be derived from drainage. It is the direct benefit to the railroad as property, and not to the company in its business, which is to be considered. Whatever tends to decrease the expense of maintenance of the track and railroad or the operation of trains is a legitimate subject for consideration, but not the possible increase of business arising from the general

increase in productiveness and prosperity of the country and the community."

In the case of City of Kankakee v. Illinois Central R. Co., 263 Ill., 589, 105 N. E. 733, the court said:

> "Witnesses for the appellee testified that the right of way was benefitted to the amount of the tax, but showed, upon cross-examination, that their opinions included improper elements, which necessarily increased their estimate. For example, the street commissioner, after testifying that he could tell the amount of the benefit by knowing the width of the street and the amount it would cost to construct the improvement and that he arrived at the benefit in that way, testified that if the street was paved it would bring more business to the lumber yard, the lumber company would sell more lumber, and the appellant would get more freight for hauling more lumber, and by that means its revenue would be increased. The Constitution and statute permit special taxation of property for the construction of local improvements, but the tax must be levied on property based upon increased value and not upon the owner of the property (Louisville & Nashville R. R. Co. v. City of East St. Louis, 134 Ill., 656, 25 N. E. 962). It was on that ground that the court held, in Cache River Drainage Dist. V. C. & E. I. R. R. Co., 255 Ill. 398, 99 N. E. 635, that the in-

> crease in passenger and freight traffic could not be considered in an assessment of benefits to right-of-way. Witnesses also included benefits to the strip of land west of the cut which would derive no benefit from the improvement."

This court in the case of L. & N. R. R. v. Barber Asphalt Co., 197 U. S. 430, emphasizes the distinction between real property and "its use," and holds in discussing the assessment of benefits against such property the "land should be considered apart from its particular *use*," and says:

> "The plea plainly means that the improvement will not benefit the lot because the lot is occupied for railroad purposes and will continue so to be occupied. That, apart from the specific use to which this land is devoted, land in a good-sized city generally will get a benefit from having the streets about it paved, and that this benefit generally will be more than the cost, are propositions which, as we already have implied, a legislature is warranted in adopting. But, if so, we are of opinion that the legislature is warranted in going one step further and saying that on the question of benefit or no benefit the land shall be considered simply in its general relations and *apart from its particular use*."

V

THERE IS NO EVIDENCE THAT AN INCREASE OF TRAFFIC WOULD RESULT FROM THE IMPROVEMENT OF THIS HIGHWAY.

In appellant's brief, page six, the following appears:

> "In its opinion in this case, the Circuit Court of Appeals states that the witnesses for appellee testify that the building of the road will not increase the traffic of the railroad. In this it is mistaken. We have gone over the testimony with the greatest care, and affirm that there is no such evidence in the record. No traffic man was called to testify. The witnesses whose testimony is relied upon by the court below are all engineers, and speak only from an engineering standpoint. They can perceive no direct benefit to the railroad such as would accrue from a parallel highway that would facilitate repairs and construction. *Not one of them denies that an increase of traffic would result; nor could he do so without placing himself in conflict with the admitted facts.*"

To refute this criticism of the statement made in the opinion of the Circuit Court of Appeals, it

is only necessary to refer to the evidence in the record.

W. C. Morse, Superintendent, who had been in the employ of the railroad since 1882, and who testified that matters affecting the property of the company comes under his jurisdiction, also testified "That there is no way by which the construction of said road could or would be of special benefit to the Railroad Company or its property," (Rec. 37), and there is no evidence that he is or ever was an Engineer.

There are many statements as to the facts that appear in appellant's brief that are not based upon the evidence, and the rule of this court requiring reference to the pages of the record is wholly ignored.

On page 2:

> "St. Louis is the business center for all this region. Thither most of its products are shipped, and from there most of its goods are imported.
>
> "The most productive territory in the vicinity of Alma is found in the Arkansas river bottoms, which are of great fertility. A high road runs from Van Buren to Little Rock, passing through these bottoms at a distance of three and one-half miles south of Alma."

On page 8:

> "This highway diverts to Alma a great deal of traffic which otherwise would go to Van Buren, to be hauled by the Frisco. It induces people to ship to Alma many goods which otherwise would be consigned to Van Bruen."

On page 9:

> "But in this instance there is more than that. Here there is a road which diverts to appellee's line traffic that otherwise would go to a rival. We submit that this is an obvious benefit, which the courts are not justitfied in ignoring.
>
> "It is not shown that the witnesses called by the railroad knew anything about its traffic. Three of them are engineers, the fourth a superintendent located at Wynne nearly two hundred and fifty miles from Alma."

These are a few examples of statements as to the facts which are not based upon any evidence in the record. The only evidence in the record to support the statement, "The fourth a superintendent located at Wynne nearly two hundred and fifty miles from Alma, is that of the superintendent himself, who testified that he was at Wynne, Arkansas, six or seven years, but at the time of the trial he was located at Van Buren, (Rec. 37), which the record shows is eight and one-half miles from Alma. (Rec. 35).

VI

LEGISLATIVE ASSESSMENT MUST STAND UNLESS DEMONSTRABLY WRONG.

Under this heading counsel for appellant, states:

> "The court pays great respect to the legislative judgment. The finding of the legislature will not be set aside unless it is demonstrably wrong."

In the answer filed in this case, the appellant, stated:

> "That the legislature of the State is the sole judge of such benefits and that its finding and enactment are conclusive of such benefits." (Rec. 18).

We submit that it is as clearly demonstrated as it is possible for testimony to make it, that the property of the railroad was not and will not be benefitted in any way by the improvement of this highway. There were very few witnesses introduced, and the only qualified witnesses testified positively to this fact.

In Myles Salt Co. v. Iberia Drainage District, 239 U. S., 478, it was held that power arbitrarily exerted, imposing a burden without a compensating advantage of any kind, amounts to confiscation

and violates the due process clause of the Fourteenth Amendment; that such a result is accomplished by the action of a local administrative body in including land within a drainage district which is palpably arbitrary, such inclusion not being for the purpose of benefitting such land directly but for the purpose of obtaining revenue therefrom. This court said:

> "We are not dealing with motives alone, but as well with their resultant action; we are not dealing with disputable grounds of discretion or disputable degrees of benefits, but with an exercise of power determined by consideration not of the improvement of plaintiff's property but solely of the improvement of the property of others—power, therefore arbitrarily exerted, imposing a burden without a compensating advantage of any kind."

And in Gast Realty & I. Co. v. Schneider Granite Co., 240 U. S. 55, it was held that a State Legislature may create taxing districts to provide for the expense of local improvements, without violating the Fourteenth Amendment, unless its action is palpably arbitrary or a plain abuse. The Court said:

> "The legislature may create taxing districts to meet the expense of local improvements, and may fix the basis of taxation without encountering the Fourteenth

> Amendment unless its action is palpably arbitrary or a plain abuse."

The authorities are collated on this question in Taylor, "On Due Process of Law," Sections 263-4.

And this court in the case of Hancock v. City of Muskogee, decided June 9th, 1919, involving assessment of benefits in a Sewer Improvement District, says:

> "We do not mean to say that if in fact it were made to appear that there was an arbitrary and unwarranted exercise of the legislative power or some denial of the equal protection of the laws in the method of exercising it judicial relief would not be accorded to parties aggrieved."

VII

BURDEN ON INTERSTATE COMMERCE

It is alleged in the bill of complaint (Rec. 4), and not denied that the plaintiff was and is engaged in interstate commerce. The only justification of the assessment of benefits argued by counsel for appellant is the probable increase in traffic; they say:

> "It is inconceivable that the railroad will not derive more than the pitiful sum of four hundred and fifty dollars per year from the traffic induced by the highways improvement."

To accept their figures for the purpose of argument, four hundred and fifty dollars per year for twenty years is nine thousand dollars for approximately three miles of main line track embraced in the district and three miles of highway to be improved. If this ratio was kept up and the approximately seven thousand miles of railroad now owned by the Missouri Pacific Railroad Company, of which the mileage involved is a part, was so assessed there would be a burden on the traffic of its system of $3,000.00 per mile or a total of $21,000,000.00, and if the roads were similarly located with reference to the railroad, they could not be seen from the right of way, as the evidence supports the findings of fact set forth in the opinion of the Circuit Court of Appeals, to-wit:

> "The contemplated road begins at the opposite end of the town of Alma from where the railroad tracks and station are, one quarter of a mile from them, and no portion of the road connects with the railroad's right of way. In addition to this, between one-eight and one-quarter of a mile of the road, is outside of the limits of the district." (Rec. 49).

However, this suggested burden on interstate commerce would be contrary to the rulings of the Interstate Commerce Commission and the decision of this court.

The Interstate Commerce Commission in the matter of the valuation of the Texas Midland Railroad, wherein the question of the allowance for expenditures for public improvements was involved, held:

> "In account No. 39 of the classification of investment in road and equipment, the carrier is required to report the cost of constructing public improvements, such as grading, sewering, curbing, guttering, paving, sidewalks, etc. This account also includes the cost of improvements when made by the carrier's employes under Government requirements. The carrier in this proceeding has expended $9,477.50 for assessments for public improvements as shown by charge to account No. 39, and claims that this amount should be included in cost of reproduction new. The amount expended is reported in original cost to date when such a figure can be ascertained. The principle announced concerning the treatment of 'topographical conditions' in cost of reproduction new applies with equal force to this item; and, since the property of the carrier is presumed to be reproduced under present topographical and other present conditions,

it will be seen that no assessment for public improvements would be incurred, and this item would therefore be proper. *As assessments for public improvements can only be levied in proportion to benefits received by the lands assessed, the present value of lands adjacent, taken as the basis for the ascertainment of the value of railroad lands, reflects the public improvements assessments in question.* It should be stated, however, that if a public improvement for which an assessment against a carrier has been made in the past is located on the right-of-way of the carrier, or so closely connected therewith that it would be wiped out if the railroad were removed, the estimated cost of reproducing it would be included in the valuation under the heading of cost of reproduction new." (Valuation Reports, I. C. C., Vol. 1, P. 1.)

This court in the Minnesota Rate Case, 230 U. S. 352, said:

> "Assuming that the company is entitled to a reasonable share in the general prosperity of the communities which it serves and thus to attribute to its property an increase in value, still the increase so allowed, apart from any improvements that it may make, can not properly extend beyond the fair average of the normal market value of land in the vicinity having a similar character. Otherwise we enter into the realm of mere conjecture."

Therefore, according to this court's opinion and that of the Interstate Commerce Commission, the benefit which a public highway bestows upon a railroad is only in proportion to the increased value of adjacent lands which would affect the cost of reproducing the railroad.

It is admitted, as testified to by a witness for the defendant, that the building or improving of the highway "Helps the people who live down there along the road." The benefit to their land is reflected in its enhanced market value; it adds to the comfort and convenience of the owners in reaching the market with the products from their farms, but a railroad right of way, the width of which, under the laws of the State of Arkansas, is only ninety-nine feet (McKennon v. St. Louis, I. M. & S. Ry. Co., 69 Ark., 104), which would be twelve acres to the mile, would not be adaptable to agricultural purposes even if the railroad as such was abandoned and the cuts and fills necessary in its construction were reduced to a level. For if an average farm of one-quarter of a section was reduced from a square to conform to the width of a railroad right of way in Arkansas, it would give a strip thirteen miles long and ninety-nine feet wide, which would destroy its value for farming purposes. The farmer, as before suggested, receives benefits in proportion to the enhanced value of his land, and his land is only chargeable with such

benefits. The merchant receives probably an increase in his business, but only the increased value of the land upon which the building in which he does business is located is charged with the benefits, and in neither case is there any limit fixed by the law as to the amount of the benefits that may accrue to them. This is not true as applied to the Railroad Company, even though it be conceded that the Railroad Company would enjoy an increase in traffic on account of the improvement of this road, yet if the railroad company was earning a fair compensation before the improvement of the highway and the improvement did increase the volume of traffic, the Interstate Commerce Commission and State Commissions would immediately reduce the rate on the traffic so as to afford only a fair and reasonable return to the railroad company on its capital investment after the payment of operating expenses.

VIII

DISCRIMINATION

In addition to what was said by the Circuit Court of Appeals in its opinion with reference to the intangible property of the railroad company being made the basis of the assessment of bene-

fits against its property, we desire to call this court's attention to the further fact of discrimination which appears in the record, and to which the Circuit Court of Appeals in its opinion referred but did not decide, as follows:

> "The undisputed facts also show that all the realty in the district except that of the plaintiff is assessed on an acreage basis; if the property of the railroad company had been assessed on the acreage basis as the other realty was, there are 7,700 acres in the district, its assessment would have been on fifty-three acres and the taxes to be paid by the railroad would have been .0071 per cent of the entire assessment, instead of being 28 per cent. Whether this is fatal, need not, in view of the conclusions reached on other issues, be determined herein."

The amount of the assessments of benefits certified by the secretary of the Commission against the property of the appellee as alleged in the bill and not denied (Rec. 10) excluding rolling stock and materials amounts to $583.03; for twenty years, would be over eleven thousand dollars. The figures to wit, $450.00 per year, were merely estimated by Witness R. C. White, based upon an estimate of cost of construction of $9,800.00, (Rec. 34), but it will be observed in the testimony of R. E. Warden, (Rec. 38), the actual cost of improving this

three and one-half miles of highway was $19,272.00.

The number of acres in the District is 7,700, if assessment of benefits had been made upon an acreage basis, the cost per acre would be approximately $2.50 per acre, but based upon the amount as certified to by the Secretary of the Commission, the appellees right of way is assessed benefits at the rate of approximately $220.00 per acre or 850 per cent more than the other lands included in the district. This discrimination is made clear in the light of the decision of this court in the Minnesota Rate Case and in the decision of the Interstate Commerce Commission, as the only possible benefits as recognized in those decisions which would accrue to railroad property is in proportion to the enhanced value of the adjacent land by reason of the improvement .

The certificate of the Secretary of the Commission shows that there was no attempt made to assess benefits against the railroad right of way as such, but the assessment of benefits as it appears is against the mileage of the main track and side tracks embraced in the District, (Rec. 10). And the county clerk testified (Rec. 35-6), that the only valuation of railroad property in Crawford county for taxation purposes is the assessment list which was handed to him by the Secretary of the Arkansas Tax Commission upon which the levy of State and county taxes are made and that "This is the

only assessment of railroads we have for county purposes."

The commission without authority under the act adopted the valuation on a per mile basis as made by the Arkansas Tax Commission, which was only given authority for the purpose of assessing railroad property after the passage of the Act creating this Road Improvement District, as hereinbefore suggested. The basis for this assessment by the Arkansas Tax Commission, under the law, is the value of the entire railroad wherever situated; its franchises, not only in Arkansas, but in other states enter into the value considered by the Tax Commission, and the property itself embraced in the district with reference to the benefits assessed is not considered separately and apart from the property in other States.

Mr. Justice McReynolds in delivering the opinion of this court in the case of Union Tank Line v. William A. Wright, Comptroller General of Georgia, March 24th, 1919, says:

> "We have accordingly sustained methods of appraisement producing results approximately correct—for example the mileage basis in case of a telegraph company (W. U. Tel. Co. v. Massachusetts), and the average amount of property habitually brought in and carried out by a car company (American Refrigerator Transit

> Co. v. Hall). But if the plan pursued is arbitrary and the consequent valuation grossly excessive it must be condemned because of conflict with the commerce clause or the Fourteenth Amendment or both."

And concludes the opinion in that case by stating:

> "We think plaintiff in error's property was appraised according to an arbitrary method which produced results wholly unreasonable and that to permit enforcement of the proposed tax would deprive it of property without due process of law and also unduly burden interstate commerce."

The adoption of the valuation of appellee's property as made by the Arkansas Tax Commission as a basis for the assessment of benefits in this improvement District is without authority of the Act creating it and is contrary to the theory often expressed and adhered to by the Supreme Court of Arkansas, that the only true basis for the assessment of benefits is the enhanced value of the property located within the boundaries of the district.

The testimony of the only Commissioner to testify demonstrates that the assessment of benefits against the property of the appellee in this District is arbitrary and unreasonable, as he states,

that he does not know what effect it would have upon the railroad. (Rec. 41).

IV

ASSESSMENT MAY BE AD VALOREM

Under this head counsel for appellant in his brief, at page 14, cites numerous authorities to sustain the statement; there is no contention made but what under the decisions of this court and the Supreme Court of Arkansas that "Assessments may be ad valorem," in fact the Circuit Court of Appeals in this case states:

> "The power of the legislature of a state to charge the cost of local improvements, either according to valuation or superificial area, or frontage cannot be questioned." Citing, Webster v. Fargo, 181 U. S. 394; St. Louis Southwestern R. R. v. Board of Directors, 81 Ark. 562; Board of Directors v. Crawford County Bank, 108 Ark. 421; Board of Improvement v. S. W. Gas & Electric Co., 121 Ark. 105.

It is contended, however, as stated by the Circuit Court of Appeals in its opinion, "But such power arbitrarily exercised, imposing a burden without a compensating advantage of any kind

amounts to confiscation, and violates the due process provision of the Fourteenth Amendment," citing Myles Salt Co. v. Board of Commissioners, 239 U. S. 478; Gast v. Schneider Granite Co., 240 U. S. 55.

The Supreme Court of Arkansas in the case of Mudd v. St. Francis Drainage District, 117 Ark. 30, on this subject, said:

> "We have held in many cases that benefit to the land affected by improvement is the only thing which justifies special assessments, and that the provision of the Constitution with reference to ad valorem taxation relates to taxation for general purposes. Uniformity is required in special assessments for local improvements, but there is nothing in the statutes of this State nor in the constitution requiring that such assessments shall be based upon value of the property. We have upheld assessments based upon value solely upon the theory that such method of assessment constitutes a legislative determination that benefits will accrue in proportion to the value and that that constitutes, after all, an assessment based upon the value of benefits and not upon the value of the property itself."

And also in the case of Mullins v. City of Little Rock, 131 Ark. 59, in discussing the limitation

upon legislative power with respect to the creation of local improvement districts, says:

> "Of course, there is the further limitation that since the only justification for the imposition of local assessments rests upon the enjoyment of special benefits to the property thus taxed, the amount of the tax must not exceed the special benefit derived; and also that the imposition of the tax must be uniform and free from unjust discrimination."

Therefore it is clear that regardless of the method adopted whether it be upon an ad valorem basis or any other basis, there is a limitation as far as local improvements are concerned that the imposition must be based upon "Special benefits to must not exceed the special benefit derived", and "That the imposition of the tax must be uniform and free from any unjust discrimination."

This doctrine announced by the Supreme Court of Arkansas merely reiterates the doctrine announced by this court and the courts of last resort in nearly every State in the Union; the authorities are collated in Page & Jones on the subject of "Taxation by Assessment," Vol. 2, Sec. 665, and in the text it is stated:

the property taxed"; "that the amount of the tax

> "It is well settled that, in theory, local assessments based on the theory of

benefits must be limited to the amount of the special benefit conferred by the improvement for which the assessment is levied, and must be apportioned upon the property assessed in substantial proportion to the amount of the benefits thus conferred."

X

TAXATION OF FRANCHISE

It is suggested at page 16 of appellant's brief that:

> "The court below made a ruling which, if sustained, will overturn the system of taxation in every State in the Union."

In view of the statement in the opinion of the Circuit Court of Appeals with reference to the power of the legislature of a State to charge the costs of local improvements, we are unable to appreciate the basis, if any, for this suggestion.

Counsel follows up the statement, by saying:

> "In Arkansas, as in every other State, a railroad is taxed as a going concern, not as a mere lot of rails, crossties and rolling stock. This is the only just method of taxation. A railroad has no value as a thing

> of beauty. Its only value is in its capacity to earn money."

It is evident from the argument made by counsel for appellant which follows the statement, that instead of the court below overturning the system of taxation that it is the appellant's desire that this court overturn completely the system that has been approved in every Sate in the Union with reference to local improvements, and in lieu of the benefits being based upon the enhancement of the value of the property itself, that as a substitute for such a basis, "The capacity to earn money" should be established, and he further suggests:

> "Suppose there were two saw mills in Alma, costing the same amount, but one of which had failed in business and was destined to be scrapped, while the other was a prosperous going concern; would not a higher assessment be placed upon the latter than upon the former?"

To the suggestion of counsel that a railroad is not a thing of beauty might appropriately be added, at this time, that "It is not a joy forever" to the stockholders and especially in view of the burdens of this character that are daily sought to be placed upon them.

The "sawmill" argument and the "going concern" idea finds no place for consideration when

viewed in the light of the words of this Special Act of the Legislature and the evidence in this case. The Act clearly says that "land"—"real estate" shall bear the burden of the improvement. If the "sawmills" similarly located on land of the same value, one a "going concern" and the other ready to be junked and is junked, and the owner of the land converts the place into a shoe factory or saloon, or some other business more profitable than the "sawmill" that is a "going concern", would it then be contended that the assessment of benefits on the land, upon which stood the junked "sawmill" should be increased in proportion to the profits of the new business? If the increase in business and the profits therefrom are to be adopted as a standard for fixing the assessment of benefits, when the business fails to be profitable, what will become of such a standard? Various schemes are devised for participating in the possible profits of business but never to bear the burden of any loss.

The Supreme Court of Arkansas has firmly declared that only "land," "real estate," and not the "use" thereof can be assessed benefits, Snetzer v. Gregg, Supra.

No attempt is made to justify the assessment upon the enhanced value of the property itself, nor could it be done under the facts, as the nearest approach of this improved road to the railroad is one-fourth of a mile and yet the railroad is assessed

over Three Thousand Dollars per mile for improving this highway, which according to the testimony of a witness for the district in summing up the benefits, "It helps the people who live down there along the road." As before suggested, when this Act of the Legislature creating this road improvement district was passed, only the physical property of the railroad in the district was subject to taxation, but the amount certified by the Arkansas Tax Commission under the subsequent Act of the legislature contains not only the tangible but the intangible value of the railroad, and this is made the basis upon which the assessment of benefits is certified to by the secretary of the Commission to the tax collector.

If the contention of appellant is sustained, then a new basis for the assessment of benefits in local improvement districts will be established and instead of the "enhancement of the value of the land." the basis will be profits arising from the business conducted on the land.

XI.

RAILROAD ESTOPPED.

Under this caption it is suggested in brief for appellant at Page 20:

> "The railroad was notified of the intention to build this highway by the pass-

> age of the Act creating the district. It also had actual notice of the building of the highway, because the rock, gravel and other material used in its construction was hauled over the railway, and the work was carried on in open view, where the railway officials had full knowledge of its progress. Nevertheless, the railroad stood by, permitted the district to issue its negotiable bonds, and to borrow the money with which to do the work, and permitted the work to be done; and then, when the highway was completed, and it was assured of the increased traffic that would result therefrom, it brought this suit to restrain the collection of taxes. To grant this prayer would be to give judicial sanction to a palpable fraud. Without the tax upon the railroad, a large part of the bonds must go unpaid."

We respectfully submit there is nothing in the record to support this purported statement of fact there is nothing to show that the railroad stood by and permitted the district to issue bonds and permitted the work to be done and that it was ever assured of an increased traffic as a result therefrom, as the record shows this Act of the Legislature was passed in 1911 and the Commissioners waited for a period of over three years before attempting to do any work under the provisions of the Act. The evidence shows that appellee used due diligence to ascertain the intention of the Commissioners in

this respect, and that the Railroad Company was advised by the Attorney for the Contractors that they would not do the work and accept the bonds in payment therefor; that it had no knowledge that the bonds were sold or to be sold, as far as the record in this case discloses.

In paragraph seven of the complaint, it is alleged, and not denied, that two of the Commissioners named in the Act refused to serve and resigned, and that thereafter two others were named in their stead by the County Judge of Crawford County, and to support this claim of estoppel, on the part of the Railroad Company, the case of Tulare Irrigation Co. v. Sheppard, 185 U. S. 1, and Sheppard v. Barron, 194 U. S., 533, are cited.

In the first case, the Improvement District repudiated its own bonds upon the ground that it was never legally organized and had no right to issue the bonds, and this after the work had been completed from the money realized from the sale of the bonds. We fail to see or appreciate how this case can bear any resemblance to the attitude of the Railroad Company in the case at bar.

In the other case, the Court says:

> "Where, as in this case, the work is done and the assessment made at the instance and request of Plaintiff's and the other owners, and pursuant to an Act (in form at least) of the legislature of the State, and in strict compliance with

> its provisions and with the petition of the landowners, there is an implied contract arising from such facts that the party at whose request and for whose benefit the work has been done will pay for it in the manner provided for by the Act under which the work was done."

In the case at bar the Railroad Company never became a party to the proceeding in any way, never petitioned for the organization of the District by the Legislature, was never consulted with reference to it, and in bringing its suit to enjoin the collection of the taxes was merely following the only remedy suggested by the Act itself.

In Section Six of said Act it is provided that the Collector shall proceed to collect the road tax provided in said Act "Unless said road tax has been enjoined by a court of competent jurisdiction."

The appellant is not in a position to insist upon the doctrine of estoppel being applicable under the facts as shown by the record, as it was said by this court in the case of Bloomfield v. Charter Oak Bank, 121 U. S. 121:

> "No estoppel *in pais* can be created except by conduct which the person setting up the estoppel has the right to rely upon and does in fact rely and act upon."

The Circuit Court of Appeals in its opinion, after quoting the testimony on this subject, says:

"This clearly does not establish an estoppel, especially as to the contractors and purchasers of the bonds, who were not parties to the formation of the district, or the assessment of benefits, nor parties to this action. Deery v. Cray, 5 Wall. 795; Thompson v. Sioux Falls Natl. Bank, 150 U. S., 231, 244. Nor was the plaintiff, or the Railroad Company, a party to any of the Board's proceedings. For more than three years after the enactment of the Act, nothing was done towards the construction of the road. This action was instituated on March 17, 1916, and while the record fails to show when the assessments were certified by the Board to the collector of taxes, it must have been done on January 1, 1916, as the bill only seeks to enjoin that year's taxes, and under the provision of the Act the taxes were to be certified by the board on or before January 1, of each year, and become payable between the first Monday in January and the 10th day of April of that year

"It therefore cannot be said that plaintiff did not act promptly."

XII.

ACT IN VIOLATION OF SECTION ONE ARTICLE TWO OF THE CONSTITUTION OF THE UNITED STATES IN THAT IT IMPAIRS THE OBLIGATION OF A CONTRACT.

It is alleged in the first paragraph of the bill and not denied:

> "That the St. Louis, Iron Mountain & Southern Railway Company was incorporated under the Acts of Arkansas of 1868, and under the laws of Missouri, and under the Constitution of the State of Arkansas, of 1868, in June, 1874, by a consolidation of the Cario & Fulton Railway Company with the St. Louis, Iron Mountain & Southern Railway Company, and became a corporation under the laws of Missouri and Arkansas, and that by reason thereof, its Charter became a contract with the State under said Constitution of the State of Arkansas of 1868, and the Constitution of the State of Arkansas of 1874, became and are a part of the Charter of the said St. Louis, Iron Mountain & Southern Railway Company." (Rec. 5).

It is further alleged in paragraph 18 of the bill:

"That said Act 228, creating said road improvement district is unconstitutional and void, for the reason that it is a special Act, and was passed and approved in violation of Article 5 of Section 25 of the Constitution of the State of Arkansas, which provides:

'That no local or special bills shall be passed until notice of the intention to apply therefor shall have been published in the locality where the matter or thing to be affected may be situated, which notice shall be published at least thirty days prior to the introduction into the General Assembly of such bill, and in the manner to be provided by law. The evidence of such notice having been published shall be exhibited in the General Assembly before such Act shall be passed."

The plaintiff states and alleges that no such notice was ever published before said Act was introduced in the General Assembly of Arkansas, and that the evidence of such notice and publication was not exhibited to the General Assembly before such Act was passed, and therefore alleges that said Act was passed and approved contrary to the provisions of the Constitution of Arkansas. And the plaintiff further states and alleges that said Section is a part of its articles of incorporation, and that it is entitled to the protection of same; it is a part of its contract with the State of Arkansas in

connection with its Charter, and that the Legislature in passing said Act, contrary to said Section of the Constitution violated Section 1, Article 10 of the Constitution of the United States, and that said Act is in violation of Section 1 of Article 10 of the Constitution of the United States which provides, in part:

"That no state shall pass any law impairing the obligation of a contract." (Rec. 15-16).

In the answer it stated:

"Denies that no notice was published or given, the required length of time before said Act was passed by the Legislature of the State of Arkansas; denies that the judicial department of the state or Federal Government or either of them are clothed with authority to enquire into or determine what notice was in fact given in said matter, but allege that said matter is a legislative question and that the determination of the Legislature in the same is final and conclusive." (Rec. 19)

The evidence of the publisher of the only newspaper published at Alma, is:

"That he has carefully examined the files of said paper and is unable to find that any notice was published therein of the application or intention to apply for the passage of the Act of the Legislature

"That said Act 228, creating said road improvement district is unconstitutional and void, for the reason that it is a special Act, and was passed and approved in violation of Article 5 of Section 25 of the Constitution of the State of Arkansas, which provides:

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"That he has carefully examined the files of said paper and is unable to find that any notice was published therein of the application or intention to apply for the passage of the Act of the Legislature

creating Crawford County Road Improvement District No. 2." (Rec. 38.)

The Secretary of State who is custodian of the records of the Legislature testified:

> "That he had examined all of the records of the Department of the Secretary of State which might, or could have any record or information in regard to Act Number 228 passed and approved in 1911 entitled "An Act creating Crawford County Road Improvement District Number 2," and do not find therein any mention or any information whatever that would tend to show that any notice was given of the introduction of this Act in the Legislature." (Rec. 39).

The Eighth assignment of error filed in the District Court is as follows:

> "The United States District Court for the Western District of Arkansas, Fort Smith Division, erred in holding, as a matter of law, that the plaintiff, railway company, is precluded by the Act of the General Assembly, Number 228, from raising the question as to whether or not Section 25 of Article 5 of the Constitution of the State of Arkansas, providing for the publication of notice of the intention to apply therefor, in the locality where the matter or thing to be affected may be situated, at least thirty days prior to the

introduction into the General Assembly of such a bill and exhibition of the evidence of the publication of such notice on the floor of the General Assembly, before such Act shall be passed, and especially in this case, wherein the Act arbitrarily fixes a basis of valuation upon the property of plaintiff for taxation or assessment, and also arbitrarily makes a finding as to the benefits which are to be charged against plaintiff's property, and in which there are no other provisions for notice, or no other opportunity given plaintiff for a hearing at which protest or complaint on account of the valuation placed upon its property, and the basis of assessment of benefits to be charged against same, may be had." (Rec. 28).

The Circuit Court of Appeals in its opinion disposes of this question by stating:

"So far as the provisions of the State Constitution are affected, their construction by the Supreme Court of the State is conclusive on the National Courts. This disposes of the assignment of error about local and special bills, notice of which had not been published, as it is the settled law of the State that the Legislature is the sole judge, whether this provision has been complied with, and if it chose to disregard it and passes a bill without notice having been published, no issue upon the subject can be raised in the courts. Davies v.

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introduction into the General Assembly of such a bill and exhibition of the evidence of the publication of such notice on the floor of the General Assembly, before such Act shall be passed, and especially in this case, wherein the Act arbitrarily fixes a basis of valuation upon the property of plaintiff for taxation or assessment, and also arbitrarily makes a finding as to the benefits which are to be charged against plaintiff's property, and in which there are no other provisions for notice, or no other opportunity given plaintiff for a hearing at which protest or complaint on account of the valuation placed upon its property, and the basis of assessment of benefits to be charged against same, may be had." (Rec. 28).

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Gaines, 48 Ark. 370, 385; Waterman v. Hawkins, 75 Ark. 120; Caton v. Drainage District, 87 Ark. 8." (Rec. 47).

We submit that the Circuit Court of Appeals erred in its conclusion on this point and that the question should be reviewed by this court.

The evidence that this provision of the Constitution was not complied with was not controverted.

> "That the Charter of a corporation is a contract and entitled to protection under the provisions of the Constitution of the United States and prohibiting the several States from passing any law impairing the obligation of contracts, is settled." 7 R. C. L., 70.

The Supreme Court of Arkansas in Arkansas Stave Co. v. State, 94 Ark. 27, states:

> "Under the decision of the Federal Supreme Court, the articles of Incorporation or Charter of the defendant is a contract between the State and the defendant, and like all other contracts it is protected by the Federal Constitution from legislation of the State impairing its obligation."

The disposition of this question by the Circuit Court of Appeals is erroneous as it assumes that the Supreme Court of Arkansas has construed this

provision of the Constitution, and that its construction is binding upon the National Courts. The decision cited by it clearly shows that the Supreme Court of Arkansas, instead of construing this provision when submitted to it, has declined to do so, holding that "it is a legislative and not a judicial question." Caton v. Drainage Dist., 87 Ark. 8.

This court has repeatedly held that:

> When reviewing the judgment of a state court in a case in which a question of the alleged impairment of contract obligations is involved, will determine for itself the existence, construction and validity of the contract, as well as the further question whether the impairment of its obligation has been effected by state legislation. Railroad v. Maryland, 187 U. S. 258; Stearns v. Minnesota, 179 U. S. 223; Wright v. Nagle, 101 U. S. 791; Railroad v. Dennis, 116 U. S. 665; Shelby County v. N. & P. Bank, 161 U. S. 149; Citizens Saving Bank v. Owensboro, 173 U. S. 636.

"This provision under the Constitution is mandatory." 6 R. C. L., Sec. 51.

The Supreme Court of the State of Alabama in the case of State v. Scott Sayre, 142 Ala. 641, says:

> "Not much remaims to be said as to the want of notice of an intention to ap-

ply for the passage of the law. The terms of the constitution above quoted are plain and mandatory, *that no local law shall be passed on any subject unless the prescribed notice is given.*"

And in the same opinion further states:

> "The fact that the state could not be required to give the notice is of no importance. If the State could not pass the law without the notice, then it would have to be given by some one before the state could properly act, and the apprehension need never be indulged that those concerned for such legislation will not give the necessary notice. If it be said, as it has been, that great evils may overtake the state if notice be required in a case of this kind, the reply is it might not be difficult to show that greater ones may arise if it is not required."

And also:

> "It is sufficient to say of our constitution that its terms are so plain and mandatory we feel closed by its provisions and can discover no escape from holding the law to be unconstitutional."

See also Norvell v. Brotherton, 143 Ala., 561, and Union Town v. State 145 Ala., 471.

The Supreme Court of Oklahoma in the case

of Hatfield v. Garnett, 45 Okla. 438, in passing upon a similar provision of the Constitution of the State of Oklahoma, says:

> "It appears that no notice of the introduction of said bill was published for four consecutive weeks in some newspaper published or of general circulation in any city or county affected by said law, stating in substance, the contents thereof, nor was verified proof of said publication filed with the Secretary of State, * * * * It is plain, then, that said law cannot be sustained as local or special legislation, because of the failure to comply with either or both of said constitutional requirements."

The provision in the Constitution of Arkansas is almost in the same language as the provision in the Constitutions of Alabama and Oklahoma, and if the Supreme Court of Arkansas had passed upon the question instead of holding that it was a "legislative not a judicial question," we feel warranted in suggesting that it would have reached the same conclusion as the Alabama and Oklahoma Supreme Courts.

XIII.

ACT IN VIOLATION OF "DUE PROCESS OF LAW" PROVISION IN THE 14TH AMENDMENT.

The Act contains no provision for hearing or any judicial inquiry as to the assessment of benefits. It declares that all real property in the district "will be benefitted by the building of the high way more than the cost thereof." There is no limit to what it might cost; No suggestion as to the material to be used in its construction; No opportunity is given for any protest or objection before the Commissioners or other body; The opportunity to protest before the Legislature itself was denied, as the Constitution of the State was violated by its introduction and passage without notice.

The cost is made a lien upon all real property in the district superior to all other liens. A more flagrant violation of the "Due Process of Law" provision can hardly be imagined.

Mr. Justice Pitney in delivering the opinion of this court in the case of Coe v. Armour Fertilizer Works, 237 U. S., 413, says:

> "In Stuart v. Palmer, 74 N. Y., 183, 188, 30 A, Rep. 289, which involved the validity of a statute providing for assess-

ing the expense of a local improvement upon the lands benefitted, but without notice to the owner, the court said: 'It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity (425) to be heard.' The soundness of this doctrine has repeatedly been recognized by this court. Thus, in Security Trust & S. B. Co. v. Lexington, 203 U. S. 323, 333, 51 L. ed. 204, 208, 27 Sup. Ct. Rep. 87, the court, by Mr. Justice Peckham, said, with respect to an assessment for back taxes: 'If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor notice may have been given of the proposed assessment . It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is whether any notice is provided for by the statute' (citing the New York cases). So in Central of Georgia R. Co. v. Wright, 207 U. S. 127, 138, 52 L. ed. 134, 141, 28 Sup. Ct. Rep. 47, the court said: 'This notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter or favor or grace.' In Roller v. Holly, 176 U. S. 398, 409, 44 L. ed. 520, 524, 20 Sup. Ct. Rep. 410, the court declared: 'The right of a citizen to

> due process of law must rest upon a basis more substantial than favor or discretion.' And in Louisville & N. R. Co. v. Central Stock Yards Co., 212 U. S. 132, 144, 53 L. ed. 441, 446, 29 Sup. Ct. Rep., 246, it was said: 'The law itself must save the parties' right and not leave them to the discretion of the courts as such.' "

In the case of Central of Georgia v. Wright, quoted from in the above opinion, the court says:

> "Reluctant as we are to interfere with the tax laws of a state, we are constrained to the conclusion that this system does not afford that due process of law which adjudges upon notice and opportunity to be heard, which it was the intention of the 14th Amendment to protect against impairment by state action."

The authorities on this subject are collated in Taylor on "Due Process of Law," under the head of "Fundamental requisites of due process." (Sec. 133.)

The Supreme Court of Indiana in an exhaustive opinion in a recent case (June 28, 1918) in which the question involved was the validity of an Act of the Legislature creating an Improvement District to clean and repair a public ditch, and the further question of the assessment of benefits provided by the Act, after reviewing the many decisions of this court on the subject, the following conclusion was reached:

> "This court is of the opinion that a judicial inquiry is a means well suited and adapted to fixing assessments in accordance with actual benefits, and that no fixed and invariable standard of apportionment is or can be well adapted to that end, and that all such standards, which makes no provision for the adjustment of such assessments by judicial investigation, should be condemned as unconstitutional for the reason that they do not provide for due process of law."

And the court further states in the opinion:

> "The authorities hold with practical unanimity that the provision of the 14th Amendment to the Federal Constitution forbidding the taking of the private property of a citizen by a state without due process of law applies as a restriction on the power to levy and collect such special assessments." Harmon et al v. Bolley et al, 120 N. E. Rep. 33. 2nd A. L. R. 609.

The special act upon which the assessment in this case is predicated, having been passed without the notice required by the Constitution of Arkansas, the defendant is deprived of its property without due process of law, and deprived of the equal protection and benefit of the law in violation of the Fourthteenth Amendment to the Constitution of the United States in that the assessment was not

made according to the process due under the law of the State where the assessment is laid.

In the case of Chicago Railway Company Against Minnesota, 134 U. S. 418, pp. 456-457, this Court speaking through Justice Blatchford said, in passing upon the Minnesota rate statute:

> "It deprives the Company of its right to a judicial investigation by due process of law under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy and substitutes therefor, as an absolute finality the action of a railroad commission which, in view of the powers conceded to it by the State court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice."

And in the recent case of Greene vs. L. & N. Railroad Company, 244 U. S. 522-555, Justice Pitney of this Court held that this presented a Federal question, a real and substantial controversy under the constitution of the United States which conferred jurisdiction upon the Federal court irrespective of the citizenship of the parties:

> "This being so, the jurisdiction of that court extended, and ours on appeal extends, to the determination of all questions involved in the case, including questions of State law, irrespective of the

> disposition that may be made of the Federal question or whether it be found necessary to decide it at all. Silver v. Louisville & Nashville R. R. Co., 213 U. S. 175, 191; Ohio Tax Cases, 232 U. S. 576, 586."

In the Green case the Court further said:

> "Is discriminatory taxation, contravening the express requirements of the state constitution, beyond redress in the courts of the United States, their jurisdiction being properly invoked, when the discrimination results from divergent action by different assessing boards whose assessments are not subject to any process of equalization established by the State, and where the diverse results are the out come, not, indeed, of any express agree ment among the officials concerned, but of intentional, systematic, and persistent undervaluation by one body of officials, presumably known to and ignored by the other body, so that in effect the two bodies act in concert? In our opinion, the answer must be in the negative."

That a special law of the Legislature which, under the constitution of the State could only be passed after the notice required by the constitution to be given would be upheld by the Supreme Court of any State upon any conclusion indulged in, in the face of the fact that no notice was given, in effect overrules the constitution of the State and

enables one branch of the State government to violate with impunity the organic law of the State if another branch of the State government fails to enforce the State constitution, and a property owner of the State would be without remedy, although claiming a right under the Federal Constitution, because the Federal Courts would follow the decision of the State Court. This is not the rule of this Court, where a Federal question is raised.

In Corn Products Refining Company against Eddy, (decision rendered April 14th, 1919,) this Court held that:

> "In reviewing the judgment of a state court in a case in which it was unsuccessfully contended that a state law deprived a party of rights secured by the Federal Constitution, the Federal Supreme Court is concerned not with the characterization of construction of the State law by the state court, nor even with the question whether it has in terms been construed, but solely with the effect and operation of the law as put in force by the state."

And this is the uniform rule where a Federal question is before the Federal court for decision:

> Lane vs. Vicksburg, 3rd Howard 464, 15 U. S. 520; Swift vs. Tyson, 74 U. S. 156.
>
> "The decision of a State Court construing a statute or unconstitutional pro

vision, which it is claimed violates some Federal right is not binding on the Federal Courts." (Railroad v. Maryland, 187 U. S. 258.

Stearns vs. Minnesota 179 U. S. 223.

Wright vs. Nagel 101 U. S. 791.

Railroad vs. Dennis 116 U. S. 665.

Shelby County vs. Bank 161 U. S. 149.

Bank vs. Owensboro 173 U. S. 636.

That any branch of the State government which is itself created by the Constitution of the State can uphold special laws or perform other acts in contravention of the Constitution, is to acknowledge that the creature is greater than its creator. The Constitution of the State is the highest expression of the will of the people of the State and under representative Government, none of the different departments of the Government should be permitted to strike down any provision of the organic law looking to the protection of personal or property rights. Nor does it answer this argument that this is a rule of property established by the decisions of the State Courts, because this special act of the Legislature has never been before the State Courts.

This court will not indulge the presumption that because other special acts have been erroneously upheld, that even the State court, in the face of

the facts showing an absolute violation of the provision of the Constitution would uphold this Act, if so, then the provisions of the Constitution for the protection of property rights, under such a condition, would become mere platitudes and the wrong instead of the right, the unlawful instead of the lawful, would be followed as a precedent.

We insist that not only because the special law in this case was passed in violation of the Constitution of the State, but also because the assessment is grossly discriminatory, that the Act should be held to be invalid.

XIV

CONCLUSION

We submit that the suggested basis for the assessment of benefits cannot be sustained.

It is contrary to the provisions of the Act itself. The Act expressly provides that the real property itself and not the "use" thereof will be benefitted.

To adopt the increase in business and the profits therefrom in lieu of the enhancement in value of the land as a basis for the assessment of benefits would overturn the system of taxation for local improvements that was established in the State of

New York in the year 1691, (Page & Jones on Taxation by Assessment, Vol. 1, Sec. 29,) and since then has been followed by every State in the Union

The success of any business and the profit therefrom depends largely upon the efficiency of its management. It was not the intention of the Legislature in this Act or any other Act to penalize efficiency in conducting business by exacting a greater tax on the land where a business is located which is efficiently managed than on land of equal value where the business is neglected. Such a standard would destroy all stability and equality of assessments. Such a standard applied to railroads would conflict with the declaration made by this court and the Interstate Commerce Commission in the cases heretofore cited.

THE ASSESSMENT IS DISCRIMINATORY

The conclusion reached by the Circuit Court of Appeals, that, "The Act imposes a higher rate of taxation on the railroad property of the plaintiff than it does on the other property in the district by reason of the fact that its franchise and other intangible property is included in its assessment," is clearly demonstrated in the provisions of the Act, "An Act to provide the method for assessing for taxation the property of railroads, etc."

EVIDENCE

The other ground upon which the decree of the District Court was reversed, "That the evidence fails to show that the railroad company derives any benefit from the road."

The evidence is fully set out in the statement herein on the question of benefits. No other conclusion can be reached than that a burden is imposed upon the property of appellees "without a compensating advantage of any kind." The cost of the road was $19,272.00 (Rec. 38) of which amount the property of appellee is charged with $9,000.00 or nearly fifty percent of the cost. To quote from the brief of Counsel for Appellant (P. 8):

> "If there was ever a case for the application of the doctrine, *res ipsa loquitor*, it is this."

Such a burden upon three miles of right of way (or 53 acres) to improve a country road three miles in length is arbitrary and unreasonable. The effect would be to take appellee's property without due process of law. Such confiscation has been condemned by this court in the following language:

> "To lay with one hand the power of the Government on the property of the citizen and with the other to bestow it upon favored individuals to aid private enterprises build up private fortunes, is

none less a robbery, because it is done under the forms of law, and is called taxation." Savings & Loan Ass'n. v. Topeka, 20 Wall, 655.

It is respectfully submitted that the decree of the Circuit Court of Appeals should be affirmed.

EDWARD J. WHITE,
THOMAS B. PRYOR,

Attorneys for Appellee.

No. 82

In the Supreme Court of the United States

OCTOBER TERM, 1919

J. H. BRANSON, Sheriff and Collector of Crawford County, et al., ... *Appellants*

vs.

B. F. BUSH, Receiver of the Property of the St. Louis, Iron Mountain & Southern Railway Company ..... *Appellee*

BRIEF FOR APPELLEE IN REPLY

Counsel for appellants in brief in reply, suggests:

> "Since the original brief was filed in this case, the proposition that a railroad may be assessed for building a highway, and that its assessment may be based on the estimated increase of its traffic has been repeatedly laid down by the Supreme Court of Arkansas."

And cites the following cases:

> Missouri Pacific R. R. Co. v. Conway County Bridge District, 134 Ark 292.
>
> Oates v. Cypress Creek Drainage District, 135 Ark., 149.

Missouri Pacific R. R. Co. v. Monroe County Road Improvement District, 209, S. W. Rep. 729.

In the first case cited the Bridge District was created by a Special Act of the Legislature of 1917, (Acts 1917, P. 314). The Act provided the mode for the ascertainment of benefits to be assessed against the property in said District and the court approved the method adopted by the Assessors by which the real estate in the District was divided into zones, holding:

> "The testimony of the witnesses shows, however, that this method of assessment was not arbitrarily fixed, but that it was determined upon by the members of the board of Assessors according to their best judgment as to the fairness, accuracy and uniformity of that method as the true benefits to be derived from the improvement."

And the conclusion reached by the court from the evidence in the record was:

> "Our conclusion is that the findings of the trial court was sustained by the evidence."

The Act itself provided that there should be a hearing on the question of benefits before the board of Assessors and an appeal to the Board of Commissioners by any party considering himself aggrieved by the acttion of the Board of Assessors, and then an appeal was provided to the Circuit Court, and Section Seven of the Act provided that railroads, telegraph and telephone lines

should be assessed by the mile and not by the acre. This is not true of the Act involved in the case at bar, as there was no provision for a hearing before any tribunal and the Act did not provide that the railroad should be assessed "By the mile and not by the acre."

In the second case cited, the Drainage District was created under Act 279 of the Acts of 1909, as amended by Act 117, Acts of 1913, which provided for a hearing before the Board of Assessors and also an appeal from the action of the Assessors to the Board of Commissioners and from the Board of Commissioners to the Circuit Court by any party deeming himself aggrieved by the assessment of benefits against his property.

The Supreme Court in its opinion stated:

> "The Circuit Court reviewed the assessments placed upon the property by the Commissioners or Assessors. He had before him numerous witnesses who expressed their opinion with reference to whether the lands were benefited and the extent thereof. In addition to hearing the evidence, he made a personal inspection of the district in company with one of the commissioners and one of the appellants in this cause."

And the Court finally concludes:

> "We think there is sufficient legal evidence in the case to sustain the apportionment of benefits."

There was also evidence that the health of the com-

munity would be promoted and the population increased by reason of the drainage, and the court held that the Assessors were justified in considering these elements in connection with the assessment of benefits. The Court cited as an authority for its holding, the case of St. L. & S. F. Ry. Co. v. Bridge District, 113 Ark. 493, and that case is quoted from in the opinion of the Circuit Court of Appeals in this case.

In the Third case, which is the latest expression of the Supreme Court of Arkansas on the subject, the doctrine so often announced by that court is again declared:

> "Railroad property is subject to assessment for local improvement the same as other kinds of real estate, but the ascertainment of benefits to that kind of property is more difficult, for the reason that it stands, to some extent, in a class to itself. Still, the inquiry as to that kind of property is to ascertain the enhancement in value or benefits to accrue from the construction of the improvement, and all of the elements which tend to create such benefit are to be considered."

The Court further says in that case:

> "There is a sharp conflict in the testimony, and we are unable to say that it is against the findings of the Chancellor. An estimate of benefits resulting from a local improvement to a given piece of property is largely a matter of opinion, and generally there is a wide differ-

ence of opinion on such questions."

It will be noted that in each of these cases the court sustained the assessment on the ground that the evidence showed that benefits would accrue to the property in proportion to the amount of the benefits so assessed. There is no evidence in the case at bar upon which a finding of benefits against the property of the appellee could be sustained, and the Circuit Court of Appeals in its opinion states:

> "The evidence hereinbefore set out convinces that the finding that the railroad would be benefited by this road is clearly against the weight of the evidence, if not entirely without any evidence to support it."

APPELLEE SHOULD TENDER TAXES ADMITTEDLY DUE.

Counsel for appellant in brief in reply states:

> "Counsel says that the present law in Arkansas for the taxation of railroads is different from that which was in existence at the time the act creating the district was adopted; and by implication they concede that the tax law, as it stood at the time the district was created, was valid. If so, they should continue to pay the taxes as assessed under that act until a valid act has been passed."

The question of taxation involved in this case is not one of general taxation, the only questions are:

(a) The provisions of the Act itself.
(b) The validity of the Act.
(c) The discrimination in the assessment of benefits.
(d) That there is no evidence in the record of any benefits that would accrue to the railroad, therefore no part of the tax assessed against it under the act is valid.

The "State Railroad Tax Case," 92 U. S., 16, quoted from, can certainly have no application to the facts as shown by the record in this case.

ESTOPPEL

Under this head the case of Fitzgerald v. Walker, 55 Ark. 148, is for the first time cited by counsel for appellants. The facts in that case are as follows: Suit was brought to restrain the collection of the tax levied for paving West Markham Street in the City of Little Rock on the ground that the price was exorbitant and unreasonable; the court in its opinion found the facts to be:

> "Some of the plaintiffs were among those who petitioned for the assessment which was the basis of the contract they now seek to avoid."

And the court further says:

> "The evidence shows that during the progress of the work the second annual assessment was paid, and it does not appear that any resistance was offered to its collection."

The court, however, held that the plaintiffs were

entitled to relief as the amount of the cost including interest exceeded the statutory limit of twenty per cent of the assessed value of the property in the District.

TAXATION OF FRANCHISE.

The holding of the Circuit Court of Appeals on this subject is supported by the decisions of the Supreme Court of Arkansas, that the franchise of a railroad cannot be assessed for local improvements.

Ft. Smith Light & Traction Co. v. McDonough, 119 Ark. 254.
Board of Improvement v. Southwestern Gas & Elec. Co., 121 Ark. 114.
Snetzer v. Gregg, 129 Ark. 546.

LOCAL STATUTE NOT VOID BECAUSE NO NOTICE WAS GIVEN.

Counsel for appellants overlooked entirely the evidence of the Secretary of State, as shown by the record, in challenging the sufficiency of the evidence to show that the notice provided by the Constitution was not given prior to the introduction of this bill in the legislature; the constitutional provision requires that "The evidence of such notice having been published shall be exhibited in the General Assembly." The Secretary of State testified: that after the examinattion of all the records in his department that he "Does not find any mention or any information whatever that would tend to show that any

notice was given of the introduction of this Act in the Legislature." (Rec. 39.)

Counsel for appellants also suggests that this court had decided in the case of St. Louis, I. M. & S. Ry. Co. v. Berry, 113 U. S. 465, "that the charter rights claimed by the plaintiff did not exist". The only question decided by the Supreme Court in that case was whether or not Section Eleven of the Act of the Legislature of January 12, 1853, incorporating the Cairo & Fulton Railroad Company, which exempted the capital stock and dividends forever from taxation and also "the road, fixtures and appurtenances shall be exempt from taxattion until after it pays an interest of not less than ten per cent per annum," remained in force and inured to the benefit of the consolidated companies regardless of the provisions of the Constitution of 1868, which was in force at the time of the consolidation. This court in passing upon the question says:

> "This new corporation did not come into existence until May 4, 1874. It came into existence as a corporation of the State of Arkansas in pursuance of its constitution and laws, and subject in all respects to their restrictions and limitations. Among these was that one (Art. 5, Sec. 48 of the Constitution of 1868) which declared that the property of corporations, now existing or hereafter created, shall forever be subject to taxation the same as property of individuals. This rendered it

impossible in law for the consolidated corporation to receive by transfer from the Cairo & Fulton Railroad Company or otherwise, the exemption sought to be enforced in this suit."

This court in the case of Wagner v. Leser, 239 U. S. 219, referred to by counsel for appellants, in sustaining the Act of the Legislature of Maryland, providing for the creation of a Paving Commission for the City of Baltimore, with power to carry out the plan for complete system of improved paving of the streets of the city, says:

> "We do not understand this to mean that there may not be cases of such flagrant abuse of legislative power as would warrant the intervention of a court of equity to protect the constitutional rights of landowners, because of arbitrary and wholly unwarranted legislative action. The constitutional protection against deprivation of property without due process of law would certainly be available to persons arbitrarily deprived of their private rights by such state action, whether under the guise of legislative authority or otherwise. But in the present case there is neither allegation nor proof of such disproportion between the assessment made and the benefit conferred as to suggest that the small tax levied upon this property would amount to an arbitrary exercise of the legislative power upon the subject."

We respectfully submit that under this statement of this Court when viewed in the light of the evidence in

the record in this case, the assessment of benefits against the property of the appellee cannot be sustained.

Respectfully submitted,

EDWARD J. WHITE,

THOMAS B. PRYOR,

Attorneys for Appellee

BRANSON, SHERIFF AND COLLECTOR OF CRAWFORD COUNTY, ET AL. *v.* BUSH, RECEIVER OF THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 82. Argued November 14, 1919.—Decided December 22, 1919.

A tax law of Arkansas (Acts 1911, p. 233), providing for the valuation of all the property of railroad companies, tangible and intangible, with assessment of buildings and side tracks, as real estate, in the town or district where located, and of main line, also as real estate, to be apportioned according to actual mileage in each town or district, declares that the franchises of such companies, "other than the right to be a corporation," are property and "shall be considered" in assessing their property. *Held*, that this does not necessarily import an addition of franchise value, viewed as personal property, to the assessment of tracks and buildings in a particular district, but requires these to be assessed at their value as realty but having regard to their use as part of a railroad; and that a special improvement tax, based on an assessment presumably so made, can not be declared invalid upon the ground of being so unequal, compared with assessments on other real estate of the district, as to violate the equal protection clause of the Fourteenth Amendment. P. 185.

A legislative determination that lands will be benefited by a public improvement for which a special tax is authorized is conclusive, unless it is arbitrary and wholly unwarranted. P. 189.

A declaration by a state legislature that real estate of a railroad company, consisting of main and side tracks and buildings in a road improvement district, will be benefited by a road improvement, is not arbitrary or unwarranted where there is reasonable ground for concluding that the railroad's traffic will thereby be increased. P. 190.

248 Fed. Rep. 377, reversed.

THE case is stated in the opinion.

Mr. G. B. Rose, with whom *Mr. W. E. Hemingway*, *Mr. D. H. Cantrell* and *Mr. J. F. Loughborough* were on the briefs, for appellants.

Mr. Thomas B. Pryor, with whom *Mr. Edward J. White* was on the briefs, for appellee.

MR. JUSTICE CLARKE delivered the opinion of the court.

By act of the General Assembly the State of Arkansas created "Crawford County Road Improvement District No. 2," a body corporate, and prescribed its boundaries. Special and Private Acts of Arkansas, 1911, p. 642.

To pay the cost of the road improvement contemplated the act provided that it should be made a charge upon all of the real property, railroads and tramroads in the district. Bonds were sold and the road completed before this suit was commenced to enjoin the collection of taxes charged against the property of the railway company, of which the appellee, hereinafter designated the Company, was receiver. The tax objected to was imposed upon the assessed value of the main track, sidetracks, rolling stock, buildings and material of the Company apportioned to the road district under a state law for the valuation of railroad property, and in the bill it is alleged to be invalid because the assessment conflicts with many provisions of the Constitutions of the United States and of Arkansas. The rate was the same for all real property in the district.

The District Court permanently enjoined the tax to the extent that it was imposed on personal property—the rolling stock and materials of the Company. From this part of the decree no appeal was taken and thereafter all question as to the invalidity of the assessment because including rolling stock and materials disappeared from the case. But, for want of equity, the bill was dismissed so

far as applicable to the real estate "designated in the bill of complaint as main track, side track, and buildings." On appeal by the Company from this part of the decree, the Circuit Court of Appeals reversed the decree of the District Court and enjoined the collection of the tax on the real estate on two grounds:

(1) Because the including of the franchise and other intangible property of the Company in the assessment results in "a higher rate of taxation" on the property of the railway company than on the other property in the district, and

(2) Because the evidence fails to show that the Company would derive any benefit from the improvement of the road.

In this court the appellants, hereinafter referred to as the Road District, assign as errors these two holdings of the Circuit Court of Appeals, and we shall consider them in the order stated.

All property of the railway company in the State was assessed by a State Tax Commission under an act, the validity of which is not assailed, providing:

"The franchises (other than the right to be a corporation) of all railroads . . . are declared to be property for the purpose of taxation and the value of such franchises shall be considered by the assessing officers when assessing the property of such corporations." Acts of Arkansas, 1911, p. 233, § 2.

The act also required the Commission to "determine the total value of the entire property of the corporation, tangible and intangible"; that the buildings and sidetracks should be assessed as real estate in the town or district where located, but that the main track, also to be assessed as real estate, should be apportioned among the several towns and districts through which the road ran according to the "actual mileage in each town and district."

The Circuit Court of Appeals did not hold either the railroad valuation or the district road improvement law unconstitutional, both being types of laws often upheld by this court (*State Railroad Tax Cases*, 92 U. S. 575; *Cleveland, etc., Ry. Co.* v. *Backus*, 154 U. S. 439, and *Houck* v. *Little River Drainage District*, 239 U. S. 254), but the first ground of its decision was, only, that the assessment of the main track under the former law, as applied to the case of taxation for benefits provided for by the latter, resulted in unequal taxation to an extent amounting to a denial of the equal protection of the laws.

The court was carried to its conclusion by this process: The act creating the Road District, and the general law applicable to local assessments in proportion to benefits, both required that only real estate should be assessed to pay for the improvement here involved; only the real estate of the other property owners of the District was assessed, and therefore when the franchises, personalty, of the railroad company were "considered" in making the assessment complained of, the Company was taxed a "higher rate," a greater amount, than other property owners and by such discrimination was denied the equal protection of the laws.

It is argued by the Road District that this conclusion is erroneous, for the reasons following:

The assessment law, which we have quoted, provides that the franchises of railroad companies ("other than the right to be a corporation") "shall be considered" by officials when assessing their property.

It is to be noted that this law does not provide for the assessment of the franchises of railroad companies separately as personal, or intangible, property, as the laws of some States require, but only declares that they are "property" which "shall be *considered* by the assessing officers when assessing the property of such corporations" and they are not valued separately in the

assessment complained of, as it is itemized in the bill of complaint.

It is not easy to define just what is meant by the "franchise" of a railroad company "other than the right to be a corporation" and the record does not attempt a definition. *Morgan* v. *Louisiana*, 93 U. S. 217, 223. The record is also silent as to what, if any, value was placed upon the franchises of the Company here involved by the State Tax Commission, and as to what extent, if at all, they were "considered" in arriving at the assessment objected to, and therefore, it is contended, that the conclusion of the Circuit Court of Appeals that personal property value was included in the assessment of the real estate within the District has no foundation on which to rest, other than the assumption that the Tax Commission conformed to the law and "considered" the franchises when assessing the real estate and that this necessarily resulted, in fact, if not in form, in such inclusion—an unusually meager basis surely for invalidating a tax of the familiar character of this before us.

If, however, the distinction sometimes taken between the "essential properties of corporate existence" and the franchises of a corporation (*Memphis & Little Rock R. R. Co.* v. *Railroad Commissioner*, 112 U. S. 609, 619), be considered substantial enough to be of practical value, and if it be assumed that the distinction was applied by the State Commission in making the assessment here involved, this would result, not in adding personal property value to the value of the real estate of the Company in the district, but simply in determining what the value of the real property was—its right of way, tracks and buildings—having regard to the use which it made of it as an instrumentality for earning money in the conduct of railroad operations. This at most is no more than giving to the real property a value greater as a part of a railroad unit and a going concern

than it would have if considered only as a quantity of land, buildings and tracks.

This is the method of assessing railroad property often approved by this court, specifically in *Cleveland, etc., Ry. Co.* v. *Backus*, 154 U. S. 439, 445, saying:

"The rule of property taxation is that the value of the property is the basis of taxation. It does not mean a tax upon the earnings which the property makes, nor for the privilege of using the property, but rests solely upon the value. But the value of property results from the use to which it is put and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determines the value, and if property is taxed at its actual cash value it is taxed upon something which is created by the uses to which it is put. In the nature of things it is practically impossible—at least in respect to railroad property—to divide its value, and determine how much is caused by one use to which it is put and how much by another."

And long experience has confirmed the statement by Mr. Justice Miller in *State Railroad Tax Cases*, 92 U. S. 575, 608, that: "It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole." And see *Kentucky Railroad Tax Cases*, 115 U. S. 321, in which, also, the contention is disposed of that the railroad track should be valued by the same officials and on the same basis of acreage as farm lands adjacent to it.

Thus, the assessment complained of was made under valid laws and in a manner approved and customary in arriving at the value of that part of railroad tracks

situate in a State, county or district. So far as this record shows, the assessment, modified by the part of the decree of the District Court not appealed from, is not a composite of real and personal property values, but is the ascertained value of the real estate—the tracks and buildings—of the Company within the taxing district, enhanced, no doubt, by the special use made of it, but still its value as a part of the railroad unit, resulting from the inherent nature of the business in which it is employed, a value which will not be resolved into its constituent elements for the purpose of defeating contribution to a public improvement. No attempt was made to prove fraudulent, or capricious or arbitrary action on the part of any officials in making the assessment, the only evidence upon the subject being the opinions of four employees of the Company that the improvement of the road would not benefit the railroad property, and if inequality has resulted from the application of the state law in a customary manner to a situation frequently arising in our country, it is an incidental inequality resulting from a valid classification of railroad property for taxation purposes which does not fall within the scope of the Fourteenth Amendment, which "was not intended to compel the State to adopt an iron rule of equal taxation." *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237. And see *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324; *Cass Farm Co.* v. *Detroit*, 181 U. S. 396, 398; *Detroit* v. *Parker*, 181 U. S. 399.

Thus, the basis for assuming that the franchises of the railroad company were added as a separate personal property value to the assessment of the real property of the Company becomes, upon this record, much too unsubstantial to justify invalidating the tax involved if it be otherwise valid, and the first assignment of error must therefore be sustained.

But the holding of the Circuit Court of Appeals that

"the evidence fails to show that the railroad company derives any benefit from the road" is also assigned as error.

In the act of the General Assembly creating this Road District it is provided:

"Section 5. It is ascertained and hereby declared that all real property within said district, including railroads and tramroads, will be benefited by the building of the said highway more than the cost thereof as appropriated in the county assessment of each piece of property within the district, for this and the succeeding years, and the cost thereof is made a charge upon such real property superior to all other mortgages and liens except the liens for the ordinary taxes, and for improvement districts heretofore organized; . . ." Special and Private Acts of Arkansas, 1911, 642, 645.

Where, in laws creating districts for local improvements and taxation, there is such a legislative declaration as this, as to what lands within the district will be benefited by the improvement, the law with respect to the extent to which such determination may be reviewed by the courts is so well settled, and has so lately been reëxamined and restated by this court, that extended discussion of the subject is not justified.

In *Spencer* v. *Merchant*, 125 U. S. 345,—a decision often cited and approved—it is decided that if the proposed improvement is one which the State had authority to make and pay for by assessments on property benefited, the legislature, in the exercise of the taxing power, has authority to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited by it; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard on the question whether their lands have been benefited or not.

The subject was carefully reëxamined and the law

restated in cases so recent as *Wagner* v. *Baltimore*, 239 U. S. 207, and *Houck* v. *Little River Drainage District*, 239 U. S. 254, with the result that the rule as we have stated it was approved, with the qualification, which was before implied, that the legislative determination can be assailed under the Fourteenth Amendment only where the legislative action is "arbitrary and wholly unwarranted," "a flagrant abuse, and by reason of its arbitrary character is mere confiscation of particular property." And see *Withnell* v. *Ruecking Construction Co.*, 249 U. S. 63, 69; *Hancock* v. *Muskogee*, 250 U. S. 454, 457; *Embree* v. *Kansas City Road District*, 240 U. S. 242, 250.

The decisions relied upon by the Company, *Norwood* v. *Baker*, 172 U. S. 269; *Myles Salt Co.* v. *Iberia Drainage District*, 239 U. S. 478; *Gast Realty Co.* v. *Schneider Granite Co.*, 240 U. S. 55, are not in conflict with the rule but plainly fall within, and are illustrations of, the qualification of it.

An application of this rule to the case before us renders not difficult the decision of the second assignment of error.

The road to be improved was "a little less than three and a half miles in length" and extended from Alma, a considerable village, on the north, southerly to an east and west road which had its western terminus at the City of Van Buren, eight miles west of the junction of the two roads. It was the principal road to and from Alma, the travel on it being greater than on all the other roads which served that village combined. In wet seasons the road was practically impassable for wagons, sometimes for three or four months together. People living south of the east and west road, who made Van Buren their trading point in wet weather, after the road was improved traded exclusively at Alma, it being four and a half miles nearer for many of them. The railway of the appellee was the only

one at Alma, but at Van Buren there was a competing road, with a line two hundred and fifty miles shorter than that of the appellee to St. Louis, the chief market for the staples of the region.

On the question of benefits which would come to the railroad property from the construction of the road, the appellee receiver called four witnesses, three of them engineers and one a superintendent of the Company. Two of these were familiar with the location of the road and the other two testified that they knew of its location in a general way. All four testified in general terms that the road was not and never would be of any benefit to the railroad. It is significant that no traffic man was called and that no evidence was introduced showing the extent of business done at Alma before and after the improvement of the road.

For the District, three witnesses were called, one a doctor, one a merchant and one a long-time resident of the village of Alma. Each of these testified that, in his opinion, the road, by making the village of Alma more accessible, particularly in the wet seasons of the year, and by developing the adjacent country, would increase the business of the railway company and would divert business from Van Buren where there was a competing railroad, to Alma where appellee had the only line. It was in evidence also that after the act was passed, but before the road was completed, a large gas producing district was discovered not far south of the southern terminus of the improved road which was tributary to it.

To this must be added the obvious fact that anything that develops the territory which a railroad serves must necessarily be of benefit to it, and that no agency for such development equals that of good roads.

This discussion of the record makes it clear that it is impossible to characterize as arbitrary, capricious or confiscatory the action of the General Assembly, in de-

claring that the property of the railroad company within the District would be benefited by the construction of the contemplated road improvement, but, on the contrary, it makes it apparent that the case is one so fully within the general rule that the holding of the Circuit Court of Appeals that the railroad would not be benefited by the improvement cannot be sustained.

It results that the decree of the Circuit Court of Appeals must be reversed and that of the District Court affirmed.

Reversed.

MR. JUSTICE MCREYNOLDS dissents.